Supreme Court, U.S.
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IN THE
Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In reviewing convictions for perjury and obstruction of justice, both based solely on three allegedly false statements to a grand jury, did the Fifth Circuit err in refusing to give *de novo* or plenary consideration to petitioner's defense of literal truth, which this Court in *Bronston v. United States* treated as a threshold issue for the court, and instead affirming simply on the basis of deferential, sufficiency of the evidence review?

II. In reviewing the same two convictions, did the Fifth Circuit further err in refusing, contrary to the clear law of ten other circuits, to give *de novo* or plenary consideration to petitioner's defense that the prosecutor's questions which elicited the charged statements were excessively and fundamentally ambiguous, and instead affirming simply on the basis of deferential, sufficiency of the evidence review?

PARTIES TO THE PROCEEDINGS

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INTRODUCTION

In the emotionally charged environment following the collapse of Enron, a Houston jury convicted petitioner of perjury and obstruction of justice, both based solely on allegedly false answers to three grand jury questions. In reviewing these convictions, the Fifth Circuit declined to afford plenary review to petitioner's legal defenses of literal truth and fundamental ambiguity, and instead affirmed because it found the evidence sufficient "to support a reasonable juror's finding that his testimony was untruthful." Pet. App. 30a. Certiorari is warranted because the Fifth Circuit's refusal to recognize either of these defenses as presenting a question of law altered the outcome of this case, puts that circuit in conflict with virtually every other circuit court in the country on one or both issues, and is inconsistent with this Court's ruling in *Bronston v. United States*, 409 U.S. 352, 362 (1973), that "[p]recise questioning is imperative as a predicate for the offense of perjury."

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-47a) is reported at 459 F.3d 509. An order of that court denying rehearing and rehearing en banc (Pet. App. 1a) is unreported. The district court's order denying petitioner's motions for judgment of acquittal (Pet. App. 55a-59a) and the jury's verdict (Pet. App. 60a-63a) are also unreported.

JURISDICTION

The court of appeals entered judgment on August 1, 2006, and denied petitioner's petitions for rehearing and rehearing en banc on October 18, 2006. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case, 28 U.S.C. §§ 1623 and 1503, are reprinted at Pet. App. 76a-78a.

STATEMENT OF THE CASE

In July 2004, the Department of Justice's Enron Task Force indicted six individuals in its second major prosecution stemming from the sudden collapse of Enron Corporation in the fall of 2001.[1] Like the Task Force's earlier prosecution of the Arthur Andersen accounting firm, *see Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), this case sought to place criminal blame upon third parties for frauds committed by Enron employees, by alleging that the third parties committed separate dishonest acts that facilitated or covered up the principal fraud. *See* Pet. App. 3a-8a.[2]

This petition challenges the only two convictions remaining out of an original fourteen secured against four non-employees of Enron in this second Task Force prosecution. Petitioner James A. Brown and three other employees of Merrill Lynch were each convicted of one count of conspiracy and two counts of wire fraud, but all of those convictions were reversed by a divided Fifth Circuit panel. Brown also was convicted of perjury and obstruction of justice, based on testimony he gave before the Enron Grand Jury. The panel affirmed those convictions on a 2-1 vote. Judge DeMoss dissented, urging Brown's acquittal.

The prosecution arose from a December 1999 transaction between Enron and Merrill Lynch, in which Merrill received, in exchange for cash and assumption of debt, shares in an Enron subsidiary whose principal assets were three power-generating barges located off the coast of Nigeria. Enron had been seeking to achieve quarterly earnings targets by selling a minority interest in the subsidiary. Tr. 2091-95. After pursuing several industry buyers, but concluding no such sale could be consummated by year end, Enron approached Merrill Lynch in December 1999. Pet. App. 3a-4a. Negotiations included several conference calls, and the drafting and execution of several agreements. Merrill and Enron consummated the share transaction on December 29, 1999. Gov. Ex. 216.[3] In recording the transaction as a sale of shares, Enron added $12,563,000 to its pre-tax earnings for the fourth quarter of 1999. Pet. App. 7a.[4]

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[1] At the time of the transaction at the heart of this case, Enron was one of the largest and most profitable companies in the United States. In the fall of 2001, however, reports began to surface that Enron executives had engaged in accounting and other improprieties. Within weeks, Enron announced a substantial charge against its prior earnings. On December 2, 2001, shortly after the SEC launched a formal investigation, Enron declared bankruptcy.

[2] Of the six individuals indicted in this case, two were employees of Enron and four, including petitioner, Daniel Bayly, Robert S. Furst, and William Fuhs, worked for Merrill Lynch. Of the two Enron employees, one, Sheila Kahanek, was acquitted, and the other, Daniel Boyle, was convicted on all counts and declined to appeal.

The transaction was memorialized in several written agreements, including an Engagement Letter, Shareholders' Agreement, and Share Purchase Agreement. These documents create an unconditional sale of shares, with no commitment of any kind by Enron to buy the shares back or find a third-party buyer. Further, each agreement contains a standard merger clause, *see* Gov. Ex. 216, ¶ 6; Gov. Ex. 220, ¶ 17.8; Gov. Ex. 221, ¶ 10.1. The Share Purchase Agreement provides: "This Agreement and the schedules hereto contain the whole agreement between the Parties relating to the sale and purchase of the Shares, and supersede all previous agreements between the Parties relating to such sale and purchase." Gov. Ex. 221, ¶ 10.1. The Share Purchase Agreement also contains a disclaimer of reliance "on any representation, warranty, covenant, undertaking, indemnity, collateral contract or other assurance made or given by any other Party or any other person, whether in writing or otherwise, at any time before signature of this Agreement, except as expressly set out herein." Gov. Ex. 221, ¶ 10.2.

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[3] As ultimately structured, Merrill purchased an equity interest for $7 million and assumed debt to Enron of $21 million. Pet. App. 4a; Gov. Ex. 216.

[4] Enron's reported profits for 1999 were $957 million, on revenues of $40.1 billion. Brian O'Reilly, *The Power Merchant [Enron #18]*, Fortune, Apr. 17, 2000, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2000/04/17/278071/index.htm (last visited Jan. 15, 2007).

Notwithstanding the clarity of the transaction as finally documented, the theory of the government's fraud and conspiracy case, as characterized by the court below, was "that the sale was a sham because Enron executives orally promised Merrill a flat fee" and guaranteed rate of return, and "allegedly promised that Enron or an affiliate would buyback Merrill's interest in the barges if no third party could be found." Pet. App. 2a. This "rendered Merrill's interest in the barges risk-free," and "Enron's accounting of the deal as a sale rather than a lease was false." *Id.* Thus, the government contended, by entering into the transaction while aware of the oral buyback promise, the Merrill Lynch defendants were knowing participants in a conspiracy and scheme to defraud Enron and its shareholders. *Id.*

The charges of perjury and obstruction against petitioner also depended on the government's assertion of an oral buy-back promise. The perjury count alleged that Brown "testified falsely as to a material matter by stating, among other things, that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction." Pet. App. 26a n.14 (internal quotation marks omitted). That count quoted three responses made by Brown to the grand jury that were alleged to be false.[5] The obstruction count reasserted these allegations, incorporating by reference the same three allegedly false statements charged as perjury. *See* Indictment ¶ 38. It further alleged that the statements were "false and misleading" (*id.* ¶ 39) for the same reason—that they denied knowledge of any oral promise relating to the barge transaction, *id.* ¶ 38. The obstruction count contained no allegations of any other acts of obstruction. *See id.* ¶¶ 38-40.

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[5] The Third Superseding Indictment quotes the following allegedly perjured testimony (underlining in original indicates statements alleged to be false):

> Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30?
>
> A: ~~It's~~ inconsistent with my understanding of what the transaction was.
>
> . . .

During the six-week trial, the evidence showed that after Enron approached Merrill in late December about buying the barge interest, there were discussions within Merrill ranging from interest in "fostering an on-going relationship with Enron" by pursuing the deal, to various concerns expressed by petitioner and others based in part on Merrill's desire not to hold the shares on any long-term basis. *See* Pet. App. 4a-5a. In particular, petitioner at this early stage noted his concerns to others: "'Enron credit/performance risk,' a lack of 'repurchase oblig. from Enron,' and the 'reputation risk' of 'aid[ing] and abet[ting] Enron income stmt. manipulation.'" Pet. App. 4a. In Merrill's internal discussions, it was made known that any repurchase commitment by Enron would be inconsistent with the entire purpose of the transaction, because the deal would no

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(continued...)

> Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?
>
> A: In – no, I don't – the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.
>
> Q: So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by a sale to another investor by June of 2000?
>
> A: No.

Pet. App. 28a-29a & n.15, 65a-69a.

longer constitute a sale and thus "Merrill would have to own the barges outright without any buyback agreement." Pet. App. 5a.

Merrill made clear to Enron its desire not to own the shares for more than six months, Pet. App. 4a-5a, and it received assurances from Enron before the sale closed that Enron would assist—and was optimistic it could succeed—in remarketing the shares within that time at a price that would produce Merrill's desired return. *Id.* Belatedly aware that such assurances left the risk of ownership with Merrill and thus required Enron's accounting treatment of the transaction as a sale, the government ultimately rested its case on the assertion of a distinct and categorical oral assurance by Enron. Specifically, the government claimed that in a telephone conversation at 9:30 a.m. on December 23, 1999, Enron's CFO, Andrew Fastow, orally assured several Merrill employees that Merrill would not own the barges for longer than six months and that if Enron could not locate a third party buyer, it would itself buy back the shares within six months. Pet. App. 6a.

It is undisputed that petitioner was not on the allegedly critical Fastow phone call, Pet. App. 6a, and no one who was on the call testified about what was said.[6] And, while some draft deal documents included references to a promise by Enron to buy back the shares, as finally executed, all documentation, including the final Engagement Letter which went out over Brown's name, embodied only an outright sale of shares, and imposed no duties whatsoever on Enron to either buy back or remarket Merrill's interest in the barges. Pet. App. 6a.

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[6] Neither Fastow nor any other participant in the December 23 conference call testified on behalf of the government at trial. The testimony of Eric Boyt, cited by the court below, Pet. App. 6a, was based upon his after-the-fact conversation with defendant Boyle, who was on the call. Tr. 2525-26. Further, the government succeeded in keeping out of evidence critical *Brady* material: a government summary of an FBI 302 report of an interview of Fastow, in which Fastow stated that he never guaranteed that Enron would repurchase Merrill Lynch's interest in the transaction, and was not sure if he used the word promise. Fastow said that he assured Merrill Lynch that it "could have a high level of confidence that an entity was interested in the barges and that entity, LJM2, would buy the barges after six months." Dkt. 241, Ex. B (RE:13). The FBI 302 summary further states that "Fastow did not say that Enron would buy back the barges, but represented instead that a third party would." Dkt. 241, Ex. B (RE:13). One reason Fastow could speak with such confidence about LJM2's intention to purchase the shares after six

On June 29, 2000, Enron arranged for the sale of Merrill's shares to LJM2, an entity that was controlled by Fastow but independent from Enron. Pet. App. 7a-8a.

More than two years later, on September 25, 2002, petitioner, voluntarily and without prior subpoena, testified before the Enron Grand Jury in Houston. He claimed no privilege and responded fully to all questions asked. Petitioner testified consistently that (i) Merrill Lynch had made it clear that it did not want to own the barges after June 30, 2000, Pet. App. 67a; (ii) Merrill Lynch had received "strong comfort" that Enron would use its best efforts to get Merrill Lynch out of the deal within six months by a sale to a third party, Pet. App. 70a; and (iii) it was his understanding that the terms of the transaction did not obligate Enron to repurchase the shares, Pet. App. 65a-67a; *see also* Pet. App. 26a n.15. Brown explained his understanding of Enron's "assurance" to Merrill Lynch in these terms:

> I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort. If assurance is synonymous with guarantee, that is not my understanding. If assurance is interpreted to be more along the lines of strong comfort or use of best efforts, that is my understanding.

Pet. App. 27a n.15, 70a.

(continued...)

months was that Fastow served as LJM2's general partner. *See* Tr. 1284, 1522-24.

Proceedings Below

In September 2004, the case went to trial in the United States District Court in Houston, Texas. At the close of the government's case, petitioner Brown moved unsuccessfully to dismiss the perjury and obstruction counts, citing *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), and *United States v. Serafini*, 167 F.3d 812 (3d Cir. 1999). *See* Brown Mot. for Acquittal at 11-14; Pet. App. 57a. On November 3, 2004, the jury returned verdicts of guilty on all charges against the Merrill Lynch defendants. Pet. App. 60a-63a.

The four Merrill employees appealed their conspiracy and wire fraud convictions. Petitioner also appealed his perjury and obstruction of justice convictions on a number of grounds, including that his answers were literally true, and that in any event the questions were so fundamentally ambiguous that, as a matter of law, they cannot support a conviction for perjury. Brown averred that these are questions of law requiring *de novo* review. *See* Brown Br. 60-61; Brown Reply Br. 41 n.42.

First, the Fifth Circuit panel, by a vote of 2-1, vacated all twelve convictions on the conspiracy and wire fraud counts, *see* Pet. App. 9a-21a, concluding that the deprivation of honest services theory of fraud, on which the government relied, was legally inapplicable to the facts of this case. Pet. App. 18a-19a. Even though these twelve counts rested simultaneously on two other alleged fraud theories (challenges to which the court did not consider), because the jury was not asked to indicate the basis for its verdict, the legal insufficiency of one theory required reversal. Pet. App. 12a, 21a (citing *Yates v. United States*, 354 U.S. 298 (1957)). Having reversed on that ground, the court declined to address any of the other arguments raised in support of a new trial, including the claim of all defendants that the trial court critically erred in excluding from evidence the government's summary of an interview of Fastow in which he denied making any unconditional oral promise. Pet. App. 9a-10a.

Next, the court unanimously reversed the trial court's failure to grant the motion of Merrill Lynch defendant William Fuhs for a judgment of acquittal at the close of the government's case. Pet. App. 21a-25a. The court upheld the district court's denial of the acquittal motions of the other defendants. Pet. App. 25a.

Finally, by a different 2-1 majority, the panel affirmed petitioner's convictions of perjury and obstruction of justice. Pet. App. 25a-36a. It categorically rejected petitioner's contention that his literal truth and fundamental ambiguity challenges are entitled to *de novo* review, finding instead that they raise only challenges to the sufficiency of the evidence, requiring deferential review of the jury's verdict. Pet. App. 29a & n.16. Applying that standard, the court upheld the convictions as based on sufficient evidence "to support a reasonable juror's finding that his testimony was untruthful." Pet. App. 30a. The court justified its conclusion on four evidentiary grounds.

First, the court noted that Brown was advised at the outset of the discussions within Merrill that Enron had requested an end-of-the-year purchase by Merrill of "$7 [million] of equity in a special purpose vehicle that would allow Enron to book $10 [million] of earnings," and that Enron "view[ed] this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months." Pet. App. 30a (internal quotation marks omitted).

Second, the court noted Brown's participation in an internal Merrill conference call on December 22, 1999, just after Merrill was first approached and seven days before the deal closed, during which reference was made to Enron's assurances "that it would help find a third party buyer," and that, if one was not found by June 30, 2000, "Enron would repurchase the barges from Merrill." Pet. App. 30a. On the same call, the court also noted, the point was made that no such written assurance could be provided, "because such an assurance would prevent Enron from receiving the accounting treatment it was seeking from the deal." *Id.*[7]

Third, the court relied on the evolution of the Engagement Letter, from a draft that referenced a buyback guarantee by Enron to a final agreement that omitted any reference whatsoever to the resale of Merrill's shares. Pet. App. 30a.

Finally, while noting unequivocally that Brown "was not a party to the Fastow call," Pet. App. 6a, 31a n.17, the court cited, as evidence of Brown's awareness of an unconditional oral buyback promise by Fastow, an e-mail sent by Brown more than fourteen months later—in March 2001. That e-mail was sent to encourage a decision by Merrill to proceed with an entirely separate deal: "I would support an unsecured deal provided we had total verbal assurances from [the company's C.E.O. or C.F.O.]." Pet. App. 6a (brackets in original). In the e-mail, Brown supported that approach by reference to the Enron barge deal: "[W]e had Fastow get on the phone with Bayly and lawyers and promise to pay us back *no matter what.*" Pet. App. 31a (emphasis added by the court). The court concluded that "a reasonable jury could consider such an admission reliable and reject Brown's proffered explanation that the e-mail was an exaggeration of 'the strength of the promise [made by Fastow].'" Pet. App. 31a n.17.

The court rejected petitioner's fundamental ambiguity argument in a single paragraph, noting that there was "no indication that Brown struggled to understand or actually misunderstood the meaning of the questions." Pet. App. 32a.

Judge DeMoss dissented from that portion of the majority opinion affirming Brown's perjury and obstruction of justice convictions. Pet. App. 43a-47a. Judge DeMoss characterized the evidence of events in December 1999 as "business negotiations preceding a deal ultimately reduced to a written agreement," Pet. App. 43a, noting that while "[e]mployees of Enron and Merrill may well have considered a buy-back agreement, promise or guarantee during the negotiations . . . [t]he conversations preceding the deal are only negotiations, and the ultimate written agreement speaks for itself." Pet. App. 44a. Because the final deal documents contained merger and integration clauses, and made no mention of any buy-back guarantee, Judge DeMoss concluded that "Merrill's $7 million was absolutely at risk. Any oral assurances of a take-out offered to Merrill by any Enron employee would not have been legally binding on Enron." Pet. App. 45a.

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[7] The court did not here note the similar comment the same day by Merrill lawyer Katherine Zrike that "Merrill would have to own the barges outright without any buyback agreement." Pet. App. 5a.

Judge DeMoss also considered the March 2001 email, which he quoted in its entirety.[8] The text of the email, he reasoned, showed that "Brown was attempting to use the success of the earlier deal to persuade a colleague" to proceed with a deal then under consideration. Pet. App. 46a. The Engagement Letter and other documents show conclusively that "[n]o legally enforceable promise was ever made to take Merrill out of the Enron deal," and "no reasonable jury could construe the e-mail as anything but an overly simplified, shorthand description of the barge investment." *Id.*

REASONS FOR GRANTING THE PETITION

Petitioner testified before the federal grand jury investigating the sudden collapse of Enron Corporation in 2001 about a December 1999 transaction which all legal documentation showed to be an unconditional sale by Enron to Merrill Lynch of a minority interest in Nigerian power barges. In response to questions framed by a series of exhibits he had never seen, petitioner testified that, while Enron had promised to use its best efforts to find a buyer, any "obligat[ion]" by Enron to relieve Merrill of the barges was "inconsistent with [his] understanding of . . . the transaction." He further testified that—contrary to a June 2000 document that, under the heading "Description of the Transaction," summarized the transaction as including a "promise" to "get [Merrill] out of the deal"—he was not aware of any such promise. The prosecutor never specifically asked about an oral promise, or any promise separate from the binding terms of the integrated, written agreements.

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[8] The email stated:

> If it[']s as grim as it sounds, I would support an unsecured deal provided we had total verbal [a]ssurance from CAL ceo or Cfo, and [S]hulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well. What do you think?

Pet. App. 45a-46a (brackets in original).

Petitioner was indicted by the grand jury and ultimately convicted on charges of perjury and obstruction of justice. Both charges were based solely on the same three responses, which the indictment alleged were false and misleading in stating that Brown "did not know of any oral agreement between Enron and Merrill Lynch relating to the barge transaction." Indictment ¶ 18. Petitioner objected at trial to the submission of these charges to the jury, *see* Brown Mot. for Acquittal at 11-14, and, on appeal, argued that they must be dismissed on the grounds of the literal truth of his answers and the fundamental ambiguity of the prosecutor's questions, *see* Brown Br. at 58-79.

This Court emphasized in *Bronston v. United States*, 409 U.S. 352, 362 (1973), that "[p]recise questioning is imperative as a predicate for the offense of perjury."[9] In accordance with this admonition, the federal courts have generally recognized that special scrutiny must be applied to allegations of false sworn statements, like those against petitioner, that depend upon the resolution of disputes over the meaning of specific testimony. In particular, the courts have recognized two distinct but closely related doctrines that foreclose prosecution, as a matter of law and based on *de novo* review by the court, of statements that either (i) are literally true under the court's independent interpretation of the testimony, or (ii) are made in response to questions that are too vague and ambiguous to allow a jury to conduct a reasoned inquiry about the defendant's intended meaning.[10]

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[9] In *Bronston*, the defendant had responded to the question whether he had ever had a Swiss bank account by noting that his company had once had one. The government later proved that the defendant once had a personal account and that he had intended, by his non-responsive answer, to falsely imply otherwise. 409 U.S. at 354. Unanimously overturning the perjury conviction, this Court rejected the government's urging that "the perjury statute be construed broadly," *id.* at 358, and held that a witness may not be convicted of perjury for an answer "that is literally true but not responsive to the question asked and arguably misleading by negative implication." *Id.* at 352-53; *see also id.* at 361-62. The Court

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(continued…)

could "perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer." *Id.* at 359.

Noting the "pressures and tensions of interrogation," which can sometimes explain a failure to give a fully responsive answer, *id.* at 358, and recognizing a historic concern that perjury laws not be applied in such a manner "as to discourage witnesses from appearing or testifying," *id.* at 359 (internal quotation marks omitted), the Court emphasized that the perjury statute must be read to place the "burden . . . on the questioner to pin the witness down to the specific object to the questioner's inquiry" and that "[p]recise questioning is imperative as a predicate for the offense of perjury." *Id.* at 360, 362.

[10] *Bronston* involved the generic federal perjury statute, 18 U.S.C. § 1621, whereas the perjury charge here arises under 18 U.S.C. § 1623, "False declarations before grand jury or court." The lower courts have routinely extended *Bronston* and the companion doctrines of literal truth and fundamental ambiguity to prosecutions under § 1623, *see, e.g.*, *United States v. Richardson*, 421 F.3d 17, 32 n.16 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2319 (2006); *United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998), and 18 U.S.C. § 1001, the false statements statute, *see United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003) (collecting

Contrary to the decisions of other courts of appeals, however, the court below—adopting a position unique among the circuit courts—refused to recognize either of these defenses as raising a legal issue requiring any independent determination by the court. Instead it ruled that these defenses required only that the evidence be sufficient "to support a reasonable juror's finding that his testimony was untruthful." Pet App. 29a & n.16. In doing so, the Fifth Circuit placed itself on the pro-prosecution side of two substantial and sharp splits in the Circuits, and denied petitioner any proper consideration of two legal defenses.[11]

(continued…)

cases). *But see United States v. Harrod*, 981 F.2d 1171, 1175-76 (10th Cir. 1992) (holding that *Bronston* does not apply to § 1001). This extension of *Bronston* comports with this Court's view that the federal perjury and false statements statutes are "analogous." *See Brogan v. United States*, 522 U.S. 398, 402 (1998).

[11] On the facts of this case, the failure of the perjury charge necessarily results in the failure of the obstruction charge. The same three allegedly "false and misleading" statements to the grand jury formed the basis of both counts, *see* Indictment ¶¶ 36-40, and no additional conduct was alleged in support of the obstruction charge. *See In re Michael*, 326 U.S. 224, 227-28 (1945) (holding that to support a determination of criminal contempt predicated on false testimony, the government must prove, *inter alia*, the "essential elements of perjury"). Otherwise charges of obstruction would offer a ready avenue to circumvent *Bronston*'s construction of the perjury statute, which avenue would be available whenever a witness testifies before a grand jury in the context of an investigation. *See United States v. Aguilar*, 515 U.S. 593, 600-01 (1995).

I. THERE IS A SUBSTANTIAL SPLIT IN THE CIRCUITS ON WHETHER THE LEGAL DEFENSE OF LITERAL TRUTH ESTABLISHED IN *BRONSTON* APPLIES TO RESPONSIVE ANSWERS

On the facts before it, this Court in *Bronston* foreclosed any prosecution under the perjury statute of testimonial statements which are literally true, even where they in fact convey—and are intended to convey—a false and misleading meaning. 409 U.S. at 359. Indeed, the Court's holding amounted to a construction of the statute as not reaching such statements, even assuming that the defendant by his evasive words sought to and succeeded in misleading his questioner. *Id.* at 358-59. *Bronston* has thus been construed by the lower courts as creating a defense to perjury allegations, based on the literal truth of the challenged statement, which stands even in the face of undisputed or overwhelming proof that the defendant chose his words carefully to convey a false and misleading message. Lower courts have generally treated this defense as raising a legal issue requiring independent determination by the court, apart from any assessment of the sufficiency of the evidence.

For example, in *United States v. Shotts*, 145 F.3d 1289, 1299 (11th Cir. 1998), the Eleventh Circuit, employing *de novo* review, *id.* at 1297, reversed a perjury conviction based on the defendant's negative response to the question, "Do you own a bail bonds business?" The government persuaded the jury that the defendant's answer was knowingly false, because all the stock in the company was held in his wife's name, *id.* at 1291, and he had represented himself and functioned as the owner. *Id.* at 1298. In reversing, the Eleventh Circuit explained that a corporation is owned by its shareholders, so that the defendant's "answer to the question whether he 'owned' the company was literally true as a matter of . . . law." *Id.* "*Bronston* expressly places on the questioner the burden of pinning the witness down to the specific object of the inquiry." *Id.* Thus, "[e]ven if [the defendant's] answer was evasive, nonresponsive, intentionally misleading and arguably false, it was literally true and cannot support a conviction under Section 1623." *Id.* at 1299.

Similarly, in *United States v. Earp*, 812 F.2d 917 (4th Cir. 1987), the Fourth Circuit conducted an independent review of the testimony and reversed a perjury conviction of a Klan member who denied before the grand jury that he had ever burned a cross at anyone's house. The defendant was asked: "How do you feel about burning crosses at the residences of interracial couples?" He answered: "I don't believe in it." He was then asked: "Have you ever done it, sir?" He answered: "No, I haven't." *Id.* at 918 (emphasis omitted). The evidence showed that the defendant had participated in an unsuccessful attempt to burn a cross in the front yard of an interracial couple. *Id.* The government alleged, and the jury agreed, that the second answer was therefore false because "[the defendant] had 'personally participated in the cross burning at the residence of [an interracial couple].'" *Id.*[12] The Fourth Circuit reversed the conviction, concluding that the defendant's answers were literally truthful because, "while he no doubt knew full well that he had on that occasion tried to burn a cross, he was not specifically asked[] about any attempted cross burnings." *Id.* at 919.[13]

Numerous other cases in the appellate courts have addressed the defense of literal truth in a similar manner—as a legal defense implementing the statutory purpose to demand precise questioning, which is decided by the court in the first instance, and not on deferential review focusing on whether any reasonable jury could find the defendant guilty. *See, e.g.*,

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[12] In addition, the government offered testimony of an FBI agent who testified that the defendant told him that he had lied to the grand jury. *Id.* at 918-19.

[13] The Fourth Circuit also applied *Bronston* to responsive answers in *United States v. Hairston*, 46 F.3d 361 (4th Cir. 1995), in which it cited *Earp* and held that a "perjury conviction cannot be based upon evasive answers or even upon misleading answers so long as they are literally true." *Id.* at 375.

United States v. Laikin, 583 F.2d 968, 970-71 (7th Cir. 1978) (applying *Bronston* to a responsive answer and reversing a conviction based on an independent review of a literal truth claim); *United States v. Vesaas*, 586 F.2d 101, 103-04 (8th Cir. 1978) (reversing a conviction based on an independent review of a literal truth claim); *United States v. Good*, 326 F.2d 589, 591-92 (4th Cir. 2003) (applying *de novo* review and affirming dismissal of perjury indictment because statements were literally true); *United States v. Baer*, 92 F. App'x 942, 944-46 (4th Cir. 2004) (same).

In recent years, a substantial conflict has developed in the circuits as to whether this legal defense of literal truth applies outside the specific context of the *Bronston* decision, in which a non-responsive answer to a prosecutor's question created a misleading implication. While several circuits, including the Fourth and the Eleventh, continue to regard *Bronston* as applicable to all claims of literal truth, *see supra* pp. 15-16, others including the First, Second, Fifth, Sixth, Eighth, and Ninth Circuits, have concluded that *Bronston*'s holding should be confined to its specific facts. These courts accept *Bronston*'s literal truth defense as a legal bar to a perjury prosecution in the instance of non-responsive but misleading answers, but hold that where an answer is responsive, a claim of literal truth is merely a challenge to the sufficiency of the evidence. Only when no reasonable juror could have found that the defendant's answer was false will a perjury conviction based on a responsive answer be reversed on a claim of literal truth.

In *United States v. DeZarn*, 157 F.3d 1042 (6th Cir. 1998), for example, the Sixth Circuit expressly ruled that *Bronston* was not applicable in the context of responsive answers. *Id.* at 1051. It thus affirmed a perjury conviction based on the defendant's responses to the prosecutor's questions, which misidentified an event as having occurred in 1991. *Id.* Although the answers were literally true, because the actual event occurred in 1990, the court upheld the conviction on the ground that the jury was permitted to look at the context of the questions and answers to determine whether the witness knew the true intent of the questions. *Id.* The court reasoned that "when the questions and answers proceed on a false premise of which the defendant is aware, he may not evade the true intent of the line of questioning by stacking literally true answers on top of the false premise." *Id.* The court also explained that "a perjury inquiry which focuses only upon the precision of the question and ignores what the Defendant knew about the subject matter of the question at the time it was asked, misses the very point of perjury: that is, the Defendant's intent to testify falsely and, thereby, mislead his interrogators." *Id.* at 1049.

In *United States v. Robbins*, 997 F.2d 390 (8th Cir. 1993), the Eighth Circuit likewise upheld a perjury conviction where the prosecutor misstated the name of the company about which he was inquiring, which made technically correct the defendant's denial that it possessed any assets (since the referenced company did not even exist). *Id.* at 394-95. The court distinguished *Bronston* by reasoning that "no unresponsive answers which could mislead the questioner are involved so we are not faced with [that] unique problem." *Id.* at 395. The court instead held that absent fundamental ambiguity, the truthfulness of defendant's answer is for the jury. *Id.* Applying a deferential review, it upheld the conviction, reasoning that "[t]he jury did not accept" the defendant's argument that the misstatement of the company name defeated the government's claim of knowing falsity, and there was "sufficient evidence to sustain the guilty jury verdict." *Id.*

A number of other courts have taken the same view, distinguishing *Bronston* on the same ground. *See, e.g.*, *United States v. Richardson*, 421 F.3d 17, 33 (1st Cir. 2005) (*Bronston* applies only where statement was "not responsive to the question asked" (internal quotation marks omitted)), *cert. denied*, 126 S. Ct. 2319 (2006); *United States v. Shafrick*, 871 F.2d 300, 303-04 (2d Cir. 1989) (*Bronston* inapplicable "[b]ecause the answer was responsive"); *United States v.*

Camper, 384 F.3d 1073, 1076 (9th Cir. 2004) (*Bronston* "limited to cases in which the statement is . . . unresponsive to the question asked"), *cert. denied*, 126 S. Ct. 38 (2006).[14]

As demonstrated in this case, the Fifth Circuit also confines *Bronston*'s legal defense of literal truth to answers that are non-responsive to the questions asked. Relying on circuit precedent,[15] the court flatly rejected petitioner's express request for *de novo* review of his *Bronston* literal truth defense and characterized the issue as a simple challenge to the sufficiency of the evidence. Pet. App. 29a n.16. As set forth in Part III below, this failure to afford plenary review to petitioner's literal truth defense was critical to the outcome of this case on appeal.

II. THE FIFTH CIRCUIT'S REFUSAL TO REVIEW *DE NOVO* CLAIMS OF FUNDAMENTAL AMBIGUITY AS A DEFENSE TO PERJURY IS CONTRARY TO THE POSITION OF EVERY OTHER CIRCUIT TO ADDRESS THE ISSUE

The circuits are also split on the proper standard for reviewing a claim that the prosecutor's questions are too ambiguous to support a perjury conviction. The vast majority of circuits treat this claim as a legal issue, conducting *de novo* review of the questions, in the context of the surrounding colloquy, to determine whether they are ambiguous and, if so, whether the ambiguity is so great that the perjury charge may not, as a matter of law, be submitted to the jury.[16] The Fifth Circuit, by contrast, has rejected the notion that a claim of fundamental ambiguity raises a threshold legal issue for *de novo* review. Instead, it requires submission of *all* ambiguous testimony to the jury and reviews only for sufficiency of the evidence.

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[14] At least two other appellate cases have simply applied sufficiency of the evidence review to literal truth defenses in the context of answers that are responsive to the prosecutor's questions without expressly distinguishing *Bronston*'s holding. *See United States v. Lighte*, 782 F.2d 367, 373 (2d Cir. 1986) (applying sufficiency of the evidence review to claim of literal truth, and holding that evidence was not sufficient to support several of defendant's answers); *United States v. Yasak*, 884 F.2d 996, 1001 (7th Cir. 1989) (holding that literal truth claim presents a question of fact for the jury, and questioning whether a trial judge can ever dismiss a perjury claim as a matter of law based on literal truth defense).

[15] In *United States v. Bell*, 623 F.2d 1132, 1136 (5th Cir. 1980), cited by the court below (Pet. App. 29a n.16, 31a), the Fifth Circuit rejected the applicability of *Bronston* in the instance of responsive "yes or no answer[s]," and held that "defendant's understanding of the question is a matter for the jury to decide."

The majority view, followed in the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits, is that the federal perjury statutes do not, as a matter of law, permit convictions where the questions on which the charged false answers are based contain "fundamental ambiguity." Because a "fundamentally ambiguous" question is "not amenable to jury interpretation," *Serafini*, 167 F.3d at 820 (internal quotation marks omitted), and *Bronston* requires precise questioning, these courts remove from the jury "the issue of a [fundamentally ambiguous] question's meaning,"

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[16] Many of these courts are explicit in stating that their review is "*de novo*" or "plenary." *See, e.g.*, *United States v. Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003) (conducting a "*de novo* examination" of the challenged questions); *United States v. Serafini*, 167 F.3d 812, 819 (3d Cir. 1999) ("plenary" review of fundamental ambiguity claim); *United States v. Farmer*, 137 F.3d 1265, 1268 (10th Cir. 1998) (applying "a *de novo* standard of review" and resolving the issue "as a matter of law"); *United States v. Swindall*, 971 F.2d 1531, 1553 (11th Cir. 1992) ("Review is *de novo*."); *United States v. Manapat*, 928 F.2d 1097, 1099 (11th Cir. 1991) (conducting "plenary" review).

Other courts plainly engage in such independent consideration of the question, without expressly characterizing the standard of review. *See, e.g.*, *United States v. Richardson*, 421 F.3d 17, 33 (1st Cir. 2005); *United States v. DeZarn*, 157 F.3d 1042, 1048-49 (6th Cir. 1998); *United States v. Robbins*, 997 F.2d 390, 395 (8th Cir. 1993); *United States v. Yasak*, 884 F.2d 996, 1003 (7th Cir. 1989); *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986).

Farmer, 137 F.3d at 1268. As the Second Circuit has explained:

> When a line of questioning is so vague as to be "fundamentally ambiguous," the answers associated with the questions posed may be insufficient as a matter of law to support [a] perjury conviction. Inasmuch as the issue then becomes one of legal sufficiency, a reviewing court may override a jury determination.

Lighte, 782 F.2d at 375 (citation omitted).

While acknowledging that "line drawing is inevitable" and a "precise[] defin[ition]" of "fundamental ambiguity" is "impossible," *Farmer*, 137 F.3d at 1269; *see also Lighte*, 782 F.2d at 375, these circuits agree that a question is fundamentally ambiguous when it does not possess "a meaning about which men of ordinary intelligence could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." *Lighte*, 782 F.2d at 375 (internal quotation marks omitted); *accord Farmer*, 137 F.3d at 1269; *see also United States v. Camper*, 384 F.3d 1073, 1076 (9th Cir. 2004) ("[a] question is fundamentally ambiguous when men of ordinary intelligence cannot arrive at a mutual understanding of its meaning" (internal quotation marks omitted)); *United States v. Shotts*, 145 F.3d 1298, 1298 n.19 (11th Cir. 1998) ("[t]he government may not send people to prison for failing to correctly guess the government's meaning").

In *United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992), for example, the Second Circuit expressly reserved for the court the power to "reverse a jury's verdict . . . if we determine that a line of questioning is so fundamentally ambiguous that 'the answers associated with the questions posed may be insufficient as a matter of law to support the perjury conviction.'" *Id.* at 808 (quoting *Lighte*, 782 F.2d at 375). Conducting a *de novo* review of the question whether the defendant had "receive[d] any money," the court held that "there was some confusion as to whether the questioner was referring to [the defendant] in her personal capacity, or as an employee[,] or as a member of the . . . territorial council." *Id.* at 809. This lack of specificity carried the question "from the realm of imprecision into the terrain of fundamental ambiguity," and required reversal of the conviction. *Id.*

Similarly, in *United States v. Serafini*, 167 F.3d 812 (3d Cir. 1999), the Third Circuit reviewed the dismissal of a perjury count alleging that the defendant had testified falsely concerning his knowledge of "another check." It conducted a careful examination of the question and its surrounding context and concluded that the question was "fatally ambiguous" with respect to which check it contemplated. *Id.* at 820 (internal quotation marks omitted). The court observed that "simple and straight-forward questions, which would have extinguished any potential ambiguity, were never asked." *Id.* at 822 (internal quotation marks omitted). The court concluded that "the lack of specificity [in the questions] [i]s a form of imprecision whose consequences must be laid at the table of the questioner, not the questioned," and upheld the dismissal of the count. *Id.* at 824 (internal quotation marks omitted); *see also Shotts*, 145 F.3d at 1298 n.19 (holding that question regarding "ownership" was fundamentally ambiguous as between legal and beneficial ownership).

Those circuits that remove "fundamentally ambiguous" questions from the jury agree that "[w]here a question considered in the proper context is only arguably ambiguous, . . . the defense of ambiguity [is viewed] as an attack upon the sufficiency of the evidence." *Farmer*, 137 F.3d at 1269. The Fourth Circuit takes an even more restrictive approach, however, holding that where there is any legitimate ambiguity in a question (and the defendant's answer is truthful under one reasonable construction), it is never appropriate to submit the issue to the jury. *See United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980) ("one cannot be found guilty of a false statement . . . when his statement is within a reasonable construction"); *United States v. Hairston*, 46 F.3d 361, 375 (4th Cir. 1995); *Camper*, 384 F.3d at 1078 (characterizing the

Fourth Circuit as having a "*per se* rule against perjury conviction for [any] ambiguous statement").

While the Fourth Circuit thus provides even greater protection against the submission of ambiguous questions to a jury than most circuits, the Fifth Circuit stands alone at the other end of the spectrum. It holds that *all* claims of ambiguity in connection with a perjury charge—including claims of "fundamental ambiguity"—raise questions of fact for the jury subject to appellate review for sufficiency of the evidence. Thus here, in response to petitioner's assertion that "conviction is precluded as a matter of law" because the questions at issue were "fundamentally ambiguous," Brown Br. at 66, the court ruled that petitioner had raised a simple challenge to the sufficiency of the evidence. Pet. App. 29a n.16.[17]

Under the approach of virtually every other circuit, by contrast, petitioner's claim of fundamental ambiguity would have been treated as a legal issue to be assessed by the court *de novo*. While the majority approach allows the jury to resolve "arguable" ambiguities in the examiner's questions, the court must in any event resolve the threshold issue of whether the level of ambiguity is such that the meaning of the question is not amenable to jury interpretation. This kind of *de novo* examination for fundamental ambiguity requires the court to examine the testimony carefully to determine whether, by a reasonable and definite interpretation, the jury could conclude that the witness understood the questions to have the meaning posited by the government. *See, e.g.*, *Farmer*, 137 F.3d at 1269-70. As demonstrated in Part III, when such a review is conducted in this case, it is apparent that the prosecutor's questions were fundamentally and fatally ambiguous.

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[17] This ruling was consistent with prior circuit holdings. *See, e.g.*, *United States. v. Parasiris*, 85 F. App'x 380, 381 (5th Cir. 2004) (per curiam) (rejecting "extra-circuit law" and holding that appropriate review is for evidentiary sufficiency "[e]ven if the term [at issue] was . . . 'fundamentally ambiguous'"); *Bell*, 623 F.2d at 1136 ("the defendant's understanding of the question is a matter for the jury to decide").

III. THE FIFTH CIRCUIT'S REFUSAL TO CONSIDER PETITIONER'S LEGAL DEFENSES THAT HIS ANSWERS WERE LITERALLY TRUE AND THAT THE PROSECUTOR'S QUESTIONS WERE FUNDAMENTALLY AMBIGUOUS CAUSED HIS CONVICTIONS TO BE AFFIRMED

The well-established defenses of literal truth and fundamental ambiguity mean that, as a matter of law, charges of making knowingly false statements under oath require more than proof beyond a reasonable doubt that the defendant intentionally conveyed a false and misleading meaning. Expressing concern about "oppression" of witnesses submitting to testimonial examination, and thus of a need to protect the investigative process itself, the Court in *Bronston* placed on the questioner—generally the prosecutor—the further burden of asking precise questions "to pin the witness down to the specific object to the questioner's inquiry." 409 U.S. at 359-61.

That imperative of "[p]recise questioning" "as a predicate for the offense of perjury," *id.* at 362, in *Bronston* led to a rule that a witness may not be convicted of lying based on a statement that is literally true, even if demonstrably and intentionally misleading. Rather than simply rest prosecution upon such a literally true though perhaps cleverly misleading statement, the Court held, it was incumbent on the questioner to follow up and secure an answer that was demonstrably false in fact, and not just by implication. In a larger category of cases invoking the fundamental ambiguity defense, courts have held that the imperative of precise questioning forecloses perjury prosecution where the questioner's lack of precision leaves it a matter of guesswork and conjecture whether a defendant's words conveyed a truthful or a false meaning.

Each of these legal defenses would have been independently dispositive in petitioner's favor had the court below not refused outright to consider them. With respect to the first grand jury statement charged by the government, petitioner provided a literally truthful description of the terms of the barge transaction. Immediately before that statement, petitioner was asked to review an e-mail exchange (which he had never before seen) between two Enron employees. The following colloquy ensued:

> Q: Do you see where it [e-mail from Glisan, Grand Jury Ex. 11, Pet App. 72a] says, "To be clear, Ene. (Enron) is obligated to get Merrill out of the deal on or about June 30th?"
>
> A: Yes, sir.
>
> Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?
>
> A: It's inconsistent with my understanding of what the transaction was.

Pet. App. 26a n.15, 65a (underlining indicates statements alleged to be false).

A virtually identical question followed immediately, which made reference to another e-mail message contained in the same document, and asked whether petitioner understood why Enron would believe "it was required . . . to get Merrill out of the deal by June 30th." In this response, petitioner again affirmed that his "understanding of the transaction" was that Enron was "not required to get us out." Pet. App. 26a n.15, 66a-67a.

Petitioner thus clearly conveyed that the terms of the "transaction" neither "obligated" nor "required" Enron to "get [Merrill] out." In so stating his understanding of a particular documented business transaction, petitioner was plainly telling the truth. It is undisputed, as Judge DeMoss explained, that the final written agreements made no mention of any obligation to relieve Merrill of its investment, either by a buyback or a third-party purchase. Pet. App. 44a-45a. Accordingly, petitioner's first alleged false statement was literally true and should not have been submitted to the jury.

The government may argue that this first alleged false statement is not literally true because petitioner's statement—that an "obligat[ion]" to get Merrill out was contrary to his understanding of the "transaction"—is susceptible to an alternative interpretation, namely to refer to an oral side promise that did not appear among the obligations contained in the legal documentation of the transaction. Even if that were correct, though, the government's questioning would be fundamentally ambiguous because the prosecutor completely failed to make clear that this alternative was his intended meaning. *See, e.g.*, *Serafini*, 167 F.3d at 824; *Markiewicz*, 978 F.2d at 809; *Shotts*, 145 F.3d at 1298 n.19.

Under *Bronston*'s requirement of precise questioning, it was incumbent on the prosecutor to follow up, if that was the meaning on which he sought to rely. Yet nowhere in the grand jury testimony did the prosecutor even once ask about petitioner's awareness of an "oral" promise, a side or collateral promise, or an assurance or commitment made separate and apart from the formal legal documentation of the transaction. Even when petitioner later mentioned a "discussion" in the context of the second charged question and then noted a "comfort" and "assurance" "from Enron that we would be taken out of the transaction within six months," Pet. App. 27a n.15, 69a-70a, the prosecutor did not follow up to seek any detail or elaboration on the who, what or when of these assurances. Instead, he simply stayed with his game plan of showing petitioner documents he had never seen and asking—as he did with all three of the charged inquiries—if petitioner understood why the document would contain a certain reference. Under the circumstances, *Bronston* and the fundamental ambiguity defense mean that petitioner cannot be made to bear the risk of the jury's conjecture that he could have intended in his first charged statement to deny an oral "obligation" to "get Merrill out."

That the first statement cannot, as a matter of law, support a perjury charge requires reversal of petitioner's convictions.[18] In any event, however, the second and third statements charged in the indictment likewise fail as a matter of law to support a perjury charge. The government's questions came just a few minutes after the first charged exchange and directly after a few more related questions and answers. Pet. App. 66a-69a. The prosecutor put in front of petitioner an LJM2 document (Pet. App. 74a-75a), which included a "Description of Transaction," and proceeded to question petitioner as follows:

> Q: Now, do you see in this document where it describes *the transaction*, and the document is dated June 29th of 2000?
>
> Do you see the first sentence where it says, "Enron sold barges to Merrill Lynch in December of 1999, promising that Merrill would be taken out by sale to another investor by June 2000"[?]
>
> Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?
>
> A In - no, I don't - the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

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[18] As this Court held in *Yates v. United States*, 354 U.S. 298 (1957), a general verdict must be reversed where one of multiple charged grounds is improper as a matter of law. *Id.* at 312; *see also* Pet. App. 21a (applying *Yates* to vacate conspiracy and wire fraud convictions in this case). Lower courts have thus held that a general verdict of perjury cannot stand if any one of several charged statements is based on a legally insufficient theory of perjury. *See United States v. Richardson*, 421 F.3d 17, 31-32, 36 (1st Cir. 2005); *United States v. Lighte*, 782 F.2d 367, 377 (2d Cir. 1986); *United States v. Damrah*, 334 F. Supp. 2d 967, 971-72 (N.D. Ohio 2004).

> Q: So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?
>
> A: No.

Pet. App. 27a n.15, 69a (underlining indicates statements alleged to be false; added emphasis indicated by italics).

Petitioner's answers were literally true because the questions were premised on statements in a document concerning a "Description of Transaction." As explained above, there was no promise that was any part of the formal documentation of the transaction between the parties, so the "Description of Transaction" in the LJM2 summary did not comport with the actual terms of the transaction. While the Fifth Circuit characterizes distinctions such as these as "hyper-technical word choice," Pet. App. 31a, courts that apply *Bronston*'s literal truth defense to responsive answers demand just such a focus on the precise meaning of the relevant questions and answers, *see supra* Part I.

At a minimum, the questions that elicited Brown's denial of a promise were fundamentally and fatally ambiguous. Once again, the prosecutor did not ask whether there was an "oral" promise or a promise separate and apart from the transaction itself. Moreover, the prosecutor's second question—in reality, several questions compounded—exemplifies the imprecision with which the prosecutor examined petitioner. As petitioner's halting response to this quagmire of questions makes clear, he struggled to grasp the thrust of the prosecutor's inquiry.

The government may argue that in mentioning "a discussion" and stating his belief that "it was not a promise," petitioner in fact denied the existence of any oral promise. But the prosecutor did not ask a single question to follow up on this volunteered reference. He did not seek to know the parties involved, the time or date of the discussion, or anything that was said. Due to the prosecutor's failure to pursue the inquiry, there is no way to know what discussion petitioner was referring to, or whether his description of it as "not a promise" was true. As this Court emphasized in *Bronston*, the prosecutor's failure to refine his questioning to the specific object of the inquiry must be borne by the government and not petitioner. *See Bronston*, 409 U.S. at 358 ("we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question").

* * * *

The court below is the only circuit in the country that treats the fundamental ambiguity defense as a matter for deferential sufficiency of the evidence review. Simultaneously, it limits *Bronston*'s literal truth defense to the unique facts of that case, where a non-responsive answer is arguably misleading. Thus, for nearly all criminal allegations of knowingly false statements under oath, the Fifth Circuit, alone among the circuits, categorically refuses to perform the gatekeeper role defined in *Bronston*. In the Fifth Circuit, every question of literal truth and every ambiguity, fundamental or otherwise, is simply another issue for the jury. This dereliction has its most ominous consequences in cases like this one, where emotions run high in the wake of public scandal, and there is risk that the honor and livelihood of honest individuals, like petitioner, will take a back seat to the need to place blame. These issues accordingly merit the attention of the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 16, 2007

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APPENDIX

UNITED STATES of America, Plaintiff–Appellee,

v.

James A. BROWN; Daniel Bayly; Robert S. Furst;
William R. Fuhs, Defendants–Appellants.

No. 05–20319

United States Court of Appeals, Fifth Circuit.

Oct. 18, 2006

Before REAVLEY, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:

The Petition of Appellant James A. Brown for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc filed by Appellant James A. Brown and Appellee USA are also DENIED.

ENTERED FOR THE COURT:

Grady Jolly/s

United States Circuit Judge

Judges Jones, Higginbotham, and Benavides did not participate in the consideration of the rehearing en banc.

UNITED STATES of America, Plaintiff–Appellee,

v.

James A. BROWN; Daniel Bayly; Robert S. Furst; William R. Fuhs, Defendants–Appellants.

No. 05–20319

United States Court of Appeals, Fifth Circuit.

Aug. 1, 2006

Before REAVLEY, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal arises from a six-week trial in which the Government charged that Enron and Merrill Lynch employees engaged in a conspiracy and scheme to defraud Enron and its shareholders by ''parking'' an Enron asset—an equity interest in three power-generating barges moored off the coast of Nigeria—with Merrill for six months for the purpose of artificially enhancing Enron's 1999 end-of-year earnings report. Merrill agreed to invest $7 million to purchase equity in the barges so that Enron could record $12 million in earnings and meet its forecasts. The Government contended, however, that the sale was a sham because Enron executives orally promised Merrill a flat fee of $250,000 and a guaranteed 15% annual rate of return over the six-month period of Merrill's investment; Enron executives allegedly promised that Enron or an affiliate would buyback Merrill's interest in the barges if no third party could be found. Such a buyback agreement, the Government contended, rendered Merrill's interest in the barges risk-free, meaning that Enron's accounting of the deal as a sale rather than a lease was false. The jury agreed and convicted the appellants of conspiracy and wire fraud. Additionally, appellant Brown was convicted of perjury and obstruction of justice. For the reasons stated below, we reverse the conspiracy and wire-fraud convictions of each of the Defendants on the legal ground that the government's theory of fraud relating to the deprivation of honest services—one of three theories of fraud charged in the Indictment—is flawed. We further vacate appellant Fuhs's conviction on the ground that the evidence is insufficient to support his conviction. Finally, we affirm appellant Brown's convictions of perjury and obstruction of justice.

I

The trial below involved six Defendants. Sheila Kahanek, an accountant by training and a Senior Director in Enron's Asia/Pacific/Africa/China ("APACHI") energy division, was acquitted of all charges against her. Daniel Boyle, an Enron Vice President of Global Finance, was convicted on all counts against him and does not appeal. The following four Merrill Lynch executives (the "Defendants") were convicted on all counts against them and appear before us on appeal: Jim Brown, the head of Merrill's Strategic Asset and Lease Finance Group in New York City; William Fuhs, a Vice President under Brown in the New York office; Daniel Bayly, the head of Merrill's Global Investment Banking division; and Robert Furst, a Merrill executive answering directly to Bayly, responsible for generating business from Enron.

A

The Nigerian barges at the heart of this case were held by Enron's APACHI energy division. At the close of 1999, APACHI was pressured to monetize or sell assets in order to show a gain and meet earnings targets that, in turn, would allow Enron as a whole to meet the company's forecasted earnings for the final quarter of 1999. Various attempts at selling APACHI's primary asset, the barges, to an industry buyer were made in the final months of 1999, but each prospective deal collapsed. In early December 1999, Enron executives discussed the need for an "emergency alternative." When executives were informed that the barges would not be sold by year's end, they responded that a "friend of Enron," Merrill Lynch, might be able to buy the barges and "help Enron out."

In late December, Enron approached Merrill about buying the barges. Boyle discussed the deal with Furst, Merrill's Enron relationship manager. Furst communicated with others at Merrill, including Bayly, Brown, and Schuyler Tilney, the head of banking in Merrill's Houston office. Furst explained that Enron's then-Treasurer, Jeff McMahon, "asked Merrill to purchase $7 [million] of equity in a special purpose vehicle that will allow Enron to book $10 [million] of earnings. The transaction must close by 12/31/99. Enron is viewing this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months. The investment would have a 22.5% return." Furst emphasized the importance of fostering an ongoing business relationship with Enron and that the deal offered Merrill a chance to differentiate itself from other investment banks. When Furst explained the deal to Katherine Zrike, chief counsel for Merrill's Global Investment Banking, Zrike noted her concern due to the year-end nature of the deal, its unique quality, and a lack of due diligence.[1]

Furst and Brown communicated by fax regarding the deal, and Brown noted his concerns: "Enron credit/performance risk," a lack of "repurchase oblig. from Enron," and the "reputational risk" of "aid[ing]/abet[ting] Enron income stmt. manipulation." Brown also communicated his concerns to Fuhs, who in turn communicated the risks, including the risk of aiding Enron with "income manipulation,'' to Tina Trinkle, an analyst. Due to these concerns, the short timeline, and a lack of information about the deal, some Merrill employees, including Trinkle, thought the deal would not go through.

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[1] On December 1, 1999, Merrill reissued its policy, warning of problematic end-of-year transactions by clients seeking to show gains or losses prior to the end of the year. "Clients wishing to effect a sale and then reestablish a position must be advised that there can be no prearrangement as to the availability of the financial instrument or the specific purchase price, if and when the client decides to reestablish the position."

According to the Government, the barge deal proceeded because Enron agreed that either it or an affiliate would repurchase the barges from Merrill if a third-party buyer could not be found and that Enron would pay a fixed rate of return for the duration of Merrill's hold of the interest in the barges. Ben Glisan, a colleague of Boyle's and a Government witness, testified that multiple sources informed him of Enron's oral guarantee that Merrill would be taken out of the transaction within six months for a set return on the investment.

On December 22, Bayly, Brown, Furst and others (excluding Fuhs and any lawyers) participated in a conference call about the deal (the ''Trinkle call''). Furst and Tilney explained that Enron needed to sell the barges by year-end in order to book additional earnings in 1999 and that someone at Enron indicated that Enron would agree to take Merrill out at a fixed rate of return. Bayly asked for a written assurance to support Enron's promise, and someone responded that a writing was not possible because such an assurance would prevent Enron from receiving the accounting treatment it sought with the deal. But either Furst or Tilney responded that Enron had given its strongest verbal assurances that Merrill would not own the barges after June 30. That same day, Brown and Fuhs received an e-mail from Furst's office in Dallas, describing some of the material terms of the deal including that Bayly would confirm Enron's promise with senior Enron management. In a later meeting with Furst that day, Zrike warned that for Enron to show the sale as a profit on its books, Merrill would have to own the barges outright without any buyback agreement. Furst stated that the agreement contemplated only Enron's attempt to remarket the barges. Zrike restated her concerns in afternoon meetings with Bayly on December 22, where the

Government alleges Bayly had a duty, under Merrill's policy, to disclose his awareness of Enron's buyback promise to Zrike but failed to do so. At the end of the day on December 22, Furst e-mailed Boyle to announce the conference call between Bayly and Enron management—Andrew Fastow, McMahon, and Boyle—for 9:30 the next morning.

According to Government witness Eric Boyt, an accountant for APACHI, both Fastow and Boyle said that during the conference call, Fastow promised that Merrill would not own the barges for longer than six months and that if Enron could not facilitate a buyer, it would "guarantee a 15 percent buyback within six months." In this vein, Boyle authored an e-mail explaining the transaction as follows: "[Merrill's] decision to purchase the equity was based solely on personal assurances by Enron senior management to [Merrill] that the transaction would not go beyond June 30, 2000." Although Brown was not on the December 23 conference call, the Government alleges that he understood Fastow's promise on Enron's behalf; this allegation is supported by Brown's later e-mail of March 2001, describing a similar, prospective deal: "I would support an unsecured deal provided we had total verbal assurances from [the company's C.E.O. or C.F.O.]. . . . We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well."

Following this call, the initial draft of the "engagement letter" for the deal, including reference to Enron's oral buyback promise, was circulated. On December 28, Boyle sent out a revised version of the engagement letter, with "strike-through" indicating proposed removal of the language about the annual rate of return and that Merrill's interest would be subsequently sold or repurchased by Enron or an Enron affiliate. Another draft, with the oral promises redacted entirely, was circulated shortly thereafter and signed by Brown and Fastow.

At the end of 1999, Enron recorded the barge deal and booked from it $12,563,000 in earnings. The Government argues this booking was a false entry because Merrill's investment was never at risk in the light of the guaranteed buyback, advisory fee, and fixed rate of return. These oral but material terms, according to the Government's witnesses, required that the deal be booked as a loan rather than as a sale.

The Government further asserted that the parties' conduct, between the end of 1999 and June 2000, was consistent with Enron's oral promise to buy back the parked barges from Merrill: Enron wired a $250,000 "advisory fee" to a Merrill account at Citibank even though Brown testified that Merrill did not provide advisory services; Merrill did not monitor Enron's attempts to remarket the barges during the interim period; efforts to remarket the barges on APACHI's behalf were motivated by a desire to preclude Enron from having to repurchase them from Merrill; Enron contacted Furst seeking an extension of the deadline; and Merrill drafted for Furst's signature a letter to Enron demanding that Enron purchase the barges by June 30 for $7,510,976.65, a number that was consistent with the terms of the oral guarantee. Before the letter left Merrill, however, Fuhs contacted Furst and told him that Enron had lined up a buyer, an entity called LJM2.[2] LJM2 served as a temporary warehouse for Enron assets, according to Glisan's testimony, and was not wholly independent from Enron.

Merrill and LJM2 closed the deal for the resale on June 29, 2000, when LJM2 paid Merrill $7,525,000 for its interest in the barges.[3] That figure represented exactly six-months' return at a rate of 15% annually. Including the $250,000 "advisory fee" received at the end of 1999, Merrill made $775,000 on its investment in the barges. At the close of the deal, Fuhs e-mailed Brown and Furst to inform them that the money had been paid to Merrill and referred to the fact that Brown and Furst (along with Bayly) were investors in LJM2 and as such still bore an interest in the barges.

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[2] Brown, Bayly, Furst, and other Merrill employees invested in a Merrill partnership which in turn invested in LJM2. Brown invested $32,500 of the $400 million LJM2 fund; Furst and Bayly each invested $130,000.

B

The Government charged all six Defendants with one count of conspiracy and two counts of wire fraud. The conspiracy count alleged a conspiracy under 18 U.S.C. § 371 to commit wire fraud in violation of § 1343 (the "money or property" charge) and § 1346 (the "honest services" charge), and to falsify Enron's books and records in violation of 15 U.S.C. § 78m(b)(2), (b)(5) and 78ff, and 17 C.F.R. § 240.13b2–1 (the "books and records" charge). The substantive wire fraud counts were based upon two interstate transmissions between Houston and New York. The Government also charged Brown with perjury before a Grand Jury in violation of 18 U.S.C. §§ 1623 and 3551, and with obstruction of a Grand Jury investigation in violation of 18 U.S.C. §§ 1503 and 3551.

The six Defendants were tried together by jury over six weeks. At the close of the Government's case in chief, each

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[3] In turn, the plan was for LJM2 to also flip the interest in the barges after the end of 2000 so that Enron would not have to show that the profits earned in 1999 were "unwound." In return for Enron's use of LJM2's balance sheet in this manner, Enron was to pay LJM2 a flat $350,000 fee and a 15% annual rate of return for the period it held the barges, and ensure that LJM2 would be taken out of the investment by January 15, 2001. An industry buyer, an energy company, ultimately bought the barges during the period LJM2 held the barges; tellingly, this ultimate buyer conducted purchase negotiations with APACHI, not with LJM2 which held the barges in name.

Defendant moved for a judgment of acquittal under Rule 29(a), claiming that the Government's evidence was insufficient to sustain a conviction on any count of the Indictment. The district court reserved ruling on the motions under Rule 29(b). Boyle and the appealing Defendants were convicted of the conspiracy and wire fraud counts; Kahanek was acquitted. Brown was additionally convicted on the perjury and obstruction counts. The Defendants renewed their motions for acquittal, and the court denied the motions in the light of ''substantial evidence justifying an inference of guilt with respect to each.'' Brown was sentenced to 46 months' imprisonment; Bayly was sentenced to 30 months' imprisonment; and Furst and Fuhs were each sentenced to 37 months' imprisonment.

II

The Defendants raise numerous issues on appeal. The Defendants' broadest attack on their convictions suggests that, even if the Government proved all the allegations in the Indictment, the alleged scheme would not run afoul of the wire fraud statutes—there was no deprivation of Enron's intangible right to the honest services of its employees, and there was no scheme to defraud Enron and its shareholders of money or property. The Defendants also claim that the crime of conspiracy does not apply to the falsification of a corporation's books and records because of explicit statutory language to that effect. 15 U.S.C § 78m(b)(2), (b)(5) and 78ff. The Defendants raise numerous further claims regarding 1) jury instructions on the theory of the defense, good faith, and the materiality requirement of the books-and-records charge; 2) evidentiary and related rulings, most notably, admission into evidence of an inculpatory e-mail by Brown, allowance of testimony as to Furst's belief that the barge deal included an Enron guarantee, exclusion of an expert witness on accounting standards, failure of the court to order disclosure of allegedly exculpatory evidence in the form of details of Fastow's interview with the FBI, and exclusion of impeachment evidence in the form of contradictory statements by Fastow; 3) the denial of their individual motions for acquittal and the sufficiency of the evidence supporting their convictions; and 4) the calculation of their sentences. Brown additionally appeals the legal and factual sufficiency of the evidence supporting his convictions for perjury and obstruction of justice, and Fuhs additionally alleges prosecutorial misconduct in the form of a repudiation of a stipulation pertaining only to him.

Because we hold that the honest-services theory of wire fraud does not extend to the circumstances as contended by the Government, we vacate the conspiracy and wire-fraud convictions. We therefore do not reach the remaining issues, with the exception of the denial of the Defendants' motions for acquittal, which we reverse only as to Fuhs, and Brown's appeal of his separate perjury and obstruction convictions, which we affirm.

III

A

We begin with the Defendants' broad attack on the legal sufficiency of the Government's assertion of criminal liability. We review the legal sufficiency of an Indictment *de novo*. *United States v. Caldwell,* 302 F.3d 399, 407 (5th Cir. 2002).[4]

The Indictment charged the Defendants with one count of conspiracy and two substantive counts of wire fraud. The conspiracy count alleged a conspiracy to violate two different statutes. The first statute is the wire-fraud statute, 18 U.S.C. § 1343, which reads:

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[4] The Government notes some confusion as to whether the Defendants' argument challenges the legal sufficiency of the Indictment or the sufficiency of the jury instructions. If the latter, the Defendants' failure to object during the charge conference would render our standard of review one for plain error. However, it is clear the Defendants mount a facial challenge to the Indictment, and the Government accepts the propriety of *de novo* review.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Following the Supreme Court's decision in *McNally v. United States,* 483 U.S. 350, 107 S. Ct. 2875, 97 L.Ed.2d 292 (1987), that § 1343 only protects "money or property" and not an employer's or the public's right to the honest services of employees and public officials, Congress added § 1346, which reads:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Thus, the conspiracy count recited two objects of the alleged conspiracy to commit wire fraud, namely, the fraudulent deprivation of Enron's intangible right to the honest services of its employees, and the fraudulent deprivation of Enron's money or property. The second criminal statute is 15 U.S.C. § 78ff, which punishes

> [a]ny person who willfully violates any provision of this chapter (other than section 78dd–1 of this title), or any rule or regulation

> thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . .

Thus, the conspiracy count alleged violation of the requirements set forth in 15 U.S.C. § 78m(b)(2),(5) and 17 C.F.R. § 240.13b2–1.[5]

Because the jury was not asked to indicate the basis for its verdict, the Government must prove all three theories in order for us to affirm the convictions. *Yates v. United States,* 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed.2d 1356 (1957). The Defendants argue that the Government has proved *none* of the three theories it alleges in the Indictment.

B

Wire fraud is (1) the formation of a scheme or artifice to defraud, and (2) use of the wires in furtherance of the scheme. *See Pereira v. United States,* 347 U.S. 1, 8, 74 S. Ct. 358, 98 L.Ed. 435 (1954); *United States v. Caldwell,* 302 F.3d 399, 406 (5th Cir. 2002). Violation of the wire-fraud statute requires the specific intent to defraud, *i.e.*, a "conscious knowing intent to defraud," *United States v. Reyes,* 239 F.3d 722, 736 (5th Cir. 2001); however, specific intent to defraud need not be charged in the Indictment.

Honest-services wire fraud is wire fraud in which the scheme or artifice to defraud "deprive[s] another of the intangible right of honest services." 18 U.S.C. § 1346. This provision can be understood only in the light of the long history of the mail- and wire-fraud statutes, which were intentionally written broadly to protect the mail and, later, the wires from being used to initiate fraudulent schemes. *See McNally,* 483 U.S. at 356, 107 S. Ct. 2875. Over time, the lower courts came to construe the fraud statutes to protect not just money and property but also intangible rights such as the right to privacy,[6] and the right to honest services of employees and public officials. In *McNally,* however, the Supreme Court excised the protection of intangible rights from the scope of §§ 1341 and 1343, holding that the statutes as written protected only money and property. The Court explained that the 1909 amendment adding "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was meant to confirm that liability covered not just fraudulent misstatements about existing facts but also fraudulent promises and representations about the future. Congress's use of the disjunctive in specifying "obtaining money or property" as an object of the fraud was not meant to expand the criminal statute beyond the protection of money and property. *Id.* at 358–60, 107 S. Ct. 2875. Congress responded by passing § 1346, which reads in its entirety, "A 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. As we and other courts have held, § 1346 was clearly meant specifically to overturn *McNally,* at least with respect to the particular intangible right named in the statute, *i.e.*, the right to honest services. *See United States v. Brumley,* 116 F.3d 728, 733 (5th Cir. 1997) (en banc); *United States v. Rybicki,* 354 F.3d 124, 134, 136–37 (2d Cir. 2003). Thus, the meaning of honest services—given that the statute provides no perimeters—is to be found in the pre-*McNally* case law. *Brumley,* 116 F.3d at 733; *Rybicki,* 354 F.3d at 136–37.

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[5] "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act." 17 C.F.R. § 240.13b2–1.

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[6] *See, e.g., United States v. Condolon,* 600 F.2d 7 (4th Cir. 1979); *United States v. Louderman,* 576 F.2d 1383 (9th Cir. 1978).

We have previously undertaken the task of considering the pre-*McNally* case law. Thus, we have written, "'Honest services' are services owed to an employer under state law," including fiduciary duties defined by the employer-employee relationship. *Caldwell,* 302 F.3d at 409; *Brumley,* 116 F.3d at 734. In order that not every breach of fiduciary duty owed by an employee to an employer constitute an illegal fraud, we have required some detriment to the employer. *United States v. Ballard,* 663 F.2d 534, 540 (5th Cir. 1981). *Ballard,* however, implies that breach of the duty to disclose material information is a sufficient detriment to the employer because the materiality requirement, added to the false disclosure or nondisclosure of information, contemplates that the undisclosed information would have led a reasonable employer to change its business conduct. *Id.* at 541; *see also Rybicki,* 354 F.3d at 145.[7] Here, the Government alleged not only the harm inherent in the failure to disclose material information—that the barge transaction presented no risk to Merrill because of the oral side deal—but also concrete harms to Enron in the form of fees paid to Merrill to effect the deal and compensation bonuses paid to Enron employees that depended on the completion of the barge deal.

The Seventh Circuit has additionally held that honest-services fraud requires some personal benefit accruing to the duty-breaching employee. *United States v. Bloom,* 149 F.3d 649 (7th Cir. 1998). Here, those same bonuses would likely constitute such a personal benefit accruing to the Enron employees taking part in the alleged scheme.

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[7] The Government must allege materiality in the Indictment, but failure to do so is not fatal "if the facts alleged in the Indictment warrant an inference of materiality." *Caldwell,* 302 F.3d at 409.

Thus, the Government presents a very plausible, even strong, case for a criminal deprivation of honest services, alleging a fiduciary breach—the failure to disclose the full truth about the barge transaction—that resulted in both a personal benefit (increased bonus) to the duty-breaching Enron employees and detriments (but also benefits) to the corporation itself.[8]

Nevertheless, the Defendants put forth an equally plausible argument that the limiting statements we have expressed in our past cases do not demarcate the exact outermost boundaries of honest services. Instead, those limiting statements represent only minimal distinctions we have had *occasion* to declare, and thus they do not exhaust the constraints that are appropriate to recognize. Thus, for example, we noted in *Brumley* that ''the boundaries of 'intangible rights' may be difficult to discern, but that does not mean that it is difficult to determine whether Brumley in particular violated them.'' *Brumley*, 116 F.3d at 733. If we are not to lapse into defining a common law crime, the outer boundary of this facially vague criminal statute must be determined from the factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases.[9] In essence, the Defendants argue that between the core of cases affirming honest-services fraud convictions and the shell of cases reversing them, there is a gap, a lacuna, a vacuum, a no-man's land, a demilitarized zone, in which this case awkwardly sits alone.

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[8] The Government's contention that Enron suffered a detriment is not trouble-free. The breach in question resulted in an increase in Enron's stock price, an immediate benefit Enron specifically sought. The Defendants indeed argue explicitly that their actions benefitted the company for this very reason. Certainly, from a practical and short-term perspective, this is true. The Government claims that the detriment was Enron's spending money (in the form of fees paid to Merrill and bonuses paid to employees) for the ''sole purpose of misleading shareholders and the investing public.'' This theory is not fully convincing absent the implicit claim that this specific deal led to Enron's unraveling, a causal connection for which there is no substantiated support. Nevertheless, we will assume for purposes of this opinion that the alleged detriment satisfies that element of honest-services fraud.

Appraising this argument requires a study of the case law to understand what behavior justifies criminal liability. We begin by noting that the Government urges the broadest reading by relying on the barest reiteration of the few constraints we have previously acknowledged, even going so far as to argue that no detriment aside from the fiduciary breach itself is necessary because "it is sufficient for the government to show that the defendants violated a duty imposed by state law. . . . The plain text of Section 1346 . . . does not require any detriment . . . beyond proof that the scheme or artifice to defraud 'deprive[d] another of the intangible right of honest services.'" Given our repeated admonition that "not every breach of fiduciary duty works a criminal fraud," *see Ballard,* 663 F.2d at 540 (quoting *United States v. George,* 477 F.2d 508, 512 (7th Cir. 1973)), we consider such a broad theory of liability with caution.[10]

Turning to the case law, we are guided by the leading opinion on honest services fraud, the Second Circuit en banc decision in *Rybicki, supra. Rybicki* concluded, and we agree, that cases upholding convictions arguably falling under the honest services rubric can be generally categorized in terms of either bribery and kickbacks or self-dealing. The great weight of cases are clear examples of such behavior.[11] The Second Circuit formulated the following rule based on its analysis:

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[9] Put another way, the Defendants argue that the scope of honest-services fraud is defined by the set of cases in which convictions have been upheld, not by the complement of the set of cases in which convictions have been reversed.

[10] It is also worth noting that the Government's argument is somewhat circular, relying as it does on the statutory text's use of the term "honest services." As already stated, the statute itself provides not a hint of the definition of the term; instead, it is the case law that establishes the meaning of the vague and amorphous phrase.

> [A] scheme or artifice to deprive another of the intangible right to honest services in section 1346, when applied to private actors, means a scheme or artifice . . . to enable an officer or employee of a private entity . . . purporting to act for and in the interests of his or her employer . . . secretly to act in his or her or the defendant's own interests instead . . . .

Rybicki, 354 F.3d at 141–42.[12] Our circuit's analysis has not been much different from *Rybicki*'s, although perhaps we have couched our language more broadly in terms of an understood *divergence,* rather than a secret *conflict,* of interests. Thus, in *Brumley,* although we recognized that bribery and self-dealing are the paradigmatic cases of honest-services fraud, we wrote:

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[11] *See Rybicki,* 354 F.3d at 139–44. For bribery/kickback cases, *see United States v. Schwartz,* 785 F.2d 673 (9th Cir. 1986); *United States v. Price,* 788 F.2d 234 (4th Cir. 1986); *United States v. George,* 477 F.2d 508 (7th Cir. 1973); *United States v. Conner,* 752 F.2d 566 (11th Cir. 1985); *United States v. Bryza,* 522 F.2d 414 (7th Cir. 1975); *United States v. Hasenstab,* 575 F.2d 1035 (2d. Cir. 1978); *United States v. Lemire,* 720 F.2d 1327 (D.C. Cir. 1983); *United States v. Bohonus,* 628 F.2d 1167 (9th Cir. 1980); *United States v. Boffa,* 688 F.2d 919 (3d Cir. 1982). For examples of self-dealing cases, *see Ballard; Epstein v. United States,* 174 F.2d 754 (6th Cir. 1949); *United States v. McCracken,* 581 F.2d 719 (8th Cir. 1978); *United States v. Von Barta,* 635 F.2d 999 (2d Cir. 1980).

[12] Note that the Second Circuit dissenters dissented not from the narrowness of the construction but from the decision to uphold the statute at all. They would have struck down honest-services fraud as facially vague, emphasizing that "'the average citizen . . . must be forewarned and given notice that certain conduct may subject him to federal prosecution.'" 354 F.3d at 159 (Jacobs, Circuit Judge, dissenting) (quoting *Brumley,* 116 F.3d at 745–46 (Jolly and DeMoss, Circuit Judges, dissenting)).

> ''honest services fraud'' contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer—or that he consciously contemplated or intended such actions. For example, something close to bribery.

Brumley, 116 F.3d at 734.

While it may be argued that the Defendants here were conscious of the fact that their actions were ''something less than in the best interests of the employer,'' at least long term, that argument relies on the presumption, inherent in the Government's insistent argument, that a fiduciary breach is itself a sufficient reflection of interest divergence. But that view encompasses every knowing fiduciary breach, and we meet again our oft-mentioned chariness of making every knowing fiduciary breach a federal crime. What makes this case exceptional is that, in typical bribery and self-dealing cases, there is usually no question that the defendant understood the benefit to him resulting from his misconduct to be at odds with the employer's expectations. This case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest.

Here, the private and personal benefit, *i.e.* increased personal bonuses, that allegedly diverged from the corporate interest was itself a promise of the corporation. According to the Government, Enron itself created an incentive structure tying employee compensation to the attainment of corporate earnings targets. In other words, this case presents a situation in which the employer itself created among its employees an understanding of its interest that, however benighted that understanding, was thought to be furthered by a scheme involving a fiduciary breach; in essence, all were driven by the concern that Enron would suffer absent the scheme. Given that the only personal benefit or incentive originated with Enron itself—not from a third party as in the case of bribery or kickbacks, nor from one's own business affairs outside the fiduciary relationship as in the case of self-dealing—Enron's legitimate interests were not so clearly distinguishable from the corporate goals communicated to the Defendants (via their compensation incentives) that the Defendants should have recognized, based on the nature of our past case law, that the ''employee services'' taken to achieve those corporate goals constituted a *criminal* breach of duty to Enron. We therefore conclude that the scheme as alleged falls outside the scope of honest-services fraud.

We do not presume that it is in a corporation's legitimate interests ever to misstate earnings—it is not. However, where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.[13]

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[13] The Government cites one precedent that lies outside the bulk of the honest-services case law and addresses a situation arguably similar to the instant case. In *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), university basketball coaches were convicted of mail and wire fraud for fraudulently establishing the academic eligibility of transfer students recruited to play on the basketball team. The court, relying on *Ballard*'s suggestion that a non-disclosure of material information is itself

Therefore, the Government must turn to other statutes, or even the wire fraud statutes absent the component of honest services, to punish this character of wrongdoing.

This opinion should not be read to suggest that no dishonest, fraudulent, wrongful, or criminal act has occurred. We hold only that the alleged conduct is not a federal crime *under the honest-services theory of fraud specifically.* Given our repeated exhortation against expanding federal criminal

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sufficient harm to the employer, rejected the defendants' argument that their actions furthered the fortunes of the basketball team and of the university and were therefore not within the purview of fraud statutes.

The Government argues, quite plausibly, that *Gray* is similar enough to this case to dispose of the Defendants' challenge, because the principal argument of the Defendants is that they believed their actions would benefit Enron. But *Gray* is distinguishable both factually and legally. *Gray* is dissimilar to this case in part because the opinion recognizes nothing akin to Enron's corporate incentive policy coupled with senior executive support for the deal (the deal was sanctioned by Fastow, Enron's Chief Financial Officer), which together created an understanding that Enron had a corporate interest in, and was a willing beneficiary of, the scheme. The opinion in *Gray* presents only the coaches' own belief that their scheme benefitted the university; no one or any authority outside the cadre of coaches encouraged, approved, or even knew of the wrongdoing. Moreover, the *Gray* court did not appear to have before it the limiting arguments presented here based on *Rybicki* (decided years after *Gray*). Thus, without attempting to call into question the result in *Gray,* we limit it to its facts, since applying the wire fraud statute here, even if it requires no new explicit statement of law, would expand honest-services fraud to reach all manner of accounting fraud and securities fraud, which have not generally been prosecuted as honest-services fraud and are heavily regulated under other statutes. The Government, in fact, would go even further; it plainly stated at oral argument its position, explicitly based on *Gray,* that the honest-services charge would reach the Defendants' conduct *even absent an oral buyback agreement.* The Government's desire to *build* on *Gray* crystalizes the danger we face of defining an ever-expanding and ever-evolving federal common-law crime.

jurisdiction beyond specific federal statutes to the defining of common-law crimes, we resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases. Instead, we apply the rule of lenity and opt for the narrower, reasonable interpretation that here excludes the Defendants' conduct. *See McNally,* 483 U.S. at 360, 107 S. Ct. 2875.

In sum, the convictions of each of the Defendants for conspiracy and wire fraud cannot be upheld on the basis of the honest-services theory and must be vacated per *Yates, supra.* We therefore need not address the viability of the Government's remaining theories of criminal liability (the money-or-property and books-and-records charges). Nor need we speak to the procedural errors alleged by the Defendants. Instead, we turn to two remaining issues: the Defendants' motions for acquittal and Brown's conviction for perjury and obstruction of justice.

IV

A

We first consider the District Court's denial of Fuhs's Motion for Judgment of Acquittal, which Fuhs submitted at the close of the Government's case-in-chief. Fuhs contends that the evidence in the Government's case-in-chief is insufficient to support a conviction.

Review for sufficiency where, as here, the motion was renewed at the close of the evidence is *de novo,* meaning that "'we determine whether . . . a rational jury could have found the essential elements of the offense beyond a reasonable doubt.' *United States v. Dean,* 59 F.3d 1479, 1484 (5th Cir. 1995)." *United States v. Alarcon,* 261 F.3d 416, 421 (5th Cir. 2001). As Fuhs notes, because the District Court reserved ruling on the motion, appellate review is limited to the evidence presented in the Government's case-in-chief. *United States v. Rhodes,* 631 F.2d 43, 44–45 (5th Cir. 1980). Thus, we ought not consider the Government's rebuttal evidence alleging that Fuhs lied on the witness stand and that he may have edited, or even authored, a key document—the Appropriation Request (Govt. Exhibit 850.1)—in the prosecution's case against all the Defendants.

The Government's case-in-chief against Fuhs consisted entirely of documents and e-mails, plus excerpts from Fuhs's statements before the SEC from 2002. The Government admits that none of its witnesses testified about Fuhs's knowing participation in the alleged scheme and that Fuhs was absent from the critical calls and meetings that allegedly put the Merrill Defendants on notice of Enron's intention to account improperly for the barge transaction. Thus, the Government relies solely on the documentary evidence to assert Fuhs's knowledge of the oral buyback promise and his intent to participate in the scheme to conceal that promise for the purpose of effecting a misaccounting of the overall deal.

We find that the documentary evidence fails to sustain the Government's burden of proof beyond a reasonable doubt. Much of the Government's evidence consists of emails or memos not written or initiated by Fuhs, not directly addressed to him, and in some cases not even copied to him. They neither recognize a secret oral side deal nor imply that the addressees of the correspondence knew of such a secret deal. While they may support the assertion that Fuhs knew Merrill wanted a buyback agreement to protect its investment, and that it was at one point understood to be part of the deal by Fuhs's subordinate Geoffrey Wilson, the principal documents relied upon by the Government simply do not sustain the inference that Fuhs had knowledge of an oral guarantee that was to be kept out of the written agreement and kept secret in (because it conflicted with) the accounting of the deal.

Fuhs's list of transactional risks was only a transcription of Brown's list to be passed along to analysts and executives. It reveals nothing regarding Fuhs's understanding of Enron's intent to misrepresent the transaction. The list does not reveal the existence of a secret buyback promise or an intent to defraud; in fact, the *absence* of a promise securing Merrill's investment is noted. Brown's suggestion, passed on by Fuhs, that Merrill might face reputational risk for aiding income manipulation does not imply the specific understanding that such income manipulation was to be effected by deception and fraudulent accounting. The Government's claim that "Fuhs would soon find out, if Brown had not already told him, that Enron was 'selling' the barges only so that it could book $12 million in earnings by the end of 1999," is neither here nor there—selling an asset quickly to book earnings by a certain date is not, by itself, fraudulent.

The Government, however, asserts that certain other documents, especially a series of revisions of the engagement letter representing the transaction, show Fuhs's knowledge of an intent to further a fraudulent accounting of the deal. The Government's inferences are deficient for two reasons. First, the revisions of the engagement letter and other pre-deal memos received by Fuhs suggest no more than an understanding that a buyback agreement was desired by Merrill and was at some point, but not ultimately, a part of the proposed deal. It is an unacceptable stretch to conclude from these documents that Fuhs had knowledge that the transaction ultimately included an oral promise to be kept secret from the lawyers and accountants in order to effect a fraudulent accounting. The fact that Fuhs forwarded to Merrill lawyers a black-lined version of the edited engagement letter in which mention of a buyback was redacted is only damning to Fuhs if one assumes he was aware that the buyback guarantee remained part of the deal. But the documents do not establish, nor does any other evidence establish, that Fuhs knew the buyback obligation survived the redaction such that the absence of references would suggest concealment. The Government cannot simply assume the linchpin of its case against Fuhs; yet it repeatedly frames documents as inculpatory by presuming that Fuhs knew of the oral promise and concluding that he willfully concealed the promise in furtherance of the deception. Second, whatever understanding these documents do reveal, such understanding is principally that of the primary communicants of the correspondence, namely, Wilson, Furst, and Boyle. The fact that Fuhs is copied on a stream of e-mails documenting the transaction is far from sufficient to support inferences that he knew of the details of an oral side agreement that survived the removal of written references to it.

The Government also produced evidence stemming from six months after the initial transaction, when Merrill was getting rid of its purported equity interest. Fuhs wrote that he had spoken to Boyle and that Enron had lined up a new buyer to purchase Merrill's interest "for the agreed upon amount outlined in the previously forwarded memo." This e-mail fails to prove anything other than that Fuhs became aware of Enron's procurement of a third-party buyer to take Merrill out of its purported equity interest. Even when taken together with the remainder of the evidence against Fuhs, the e-mail demonstrates neither the knowledge of a secret repurchase obligation owed by Enron nor the specific intent to defraud by the concealment of that obligation. Nor does Fuhs's jocose reply, "only if i can guarantee a make-whole at par + return in case of civil unrest/war," to Brown's query, "wanna buy a barge?", after Merrill had sold its stake but Brown was still exposed because of his involvement in LJM2, add much evidence of the requisite knowledge and the specific intent of Fuhs to defraud in the purchase of the barge six months earlier.

As counsel for Fuhs noted at oral argument, if we begin with the assumption that Fuhs is guilty, the documents can be read to support that assumption. But if we begin with the proper presumption that Fuhs is not guilty until proven guilty beyond a reasonable doubt, we must conclude that the evidence is insufficient to prove beyond a reasonable doubt that Fuhs had the knowledge and intent to enter into the fraudulent scheme alleged by the Government.

Ultimately, we do not have to conclude that Fuhs was an innocent in the deal to relieve Enron of the barges. We only conclude that at the close of its case, the Government had failed to support its charges against Fuhs with sufficient evidence of guilty knowledge, as charged in the Indictment, to survive his motion for judgment of acquittal.

B

Regarding the other Defendants' motions for acquittal, we have reviewed the record and are satisfied that the Government's evidence was not so patently deficient that a judgment of acquittal was required as a matter of law.

V

We turn finally to Brown's convictions for perjury and obstruction of justice. These charges stem from testimony Brown gave to the grand jury investigating the barge transaction in the fall of 2002. The Government charged that Brown's testimony concerning the agreement between Enron and Merrill was perjurious and ultimately constituted obstruction of justice. The jury agreed and convicted Brown under 18 U.S.C. § 1623 of one count of perjury, and under 18 U.S.C. § 1503 of one count of obstruction of justice. We affirm these convictions.

A

18 U.S.C. § 1623 defines perjury as "knowingly mak[ing] a false material declaration" to a grand jury. The Government charged Brown with one count of perjury, contending that Brown knew or understood that Enron promised to remove Merrill from the barge deal by June 30, and that Brown perjuriously denied under oath any such

knowledge or understanding.[14] The Indictment quotes the following testimony by Brown as constituting perjury (the underlining is in the original and indicates the portions alleged to be false): [15]

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[14] Specifically, the Indictment alleges that "[w]hile under oath, Defendant BROWN testified falsely as to a material matter by stating, among other things, that he did not know of any oral promise between Enron and Merrill Lynch relating to the barge transaction."

[15] The portion of the testimony from which the excerpts in the Indictment were taken is as follows:

Q: Do you see where it [e-mail from Boyle, Grand Jury Exhibit 11] says, "To be clear, Enc. (Enron) is obligated to get Merrill out of the deal on or about June 30th?"

A: Yes, sir.

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A: It is inconsistent with my understanding of what the transaction was.

. . . .

Q: . . . And the question to you is do you have any understanding as to whether—how or why—Enron would believe that it was—it understood that it was required . . . to get Merrill Lynch out of the deal by June 30th?

A: I did not understand—you know, my understanding of the transaction was that they were not required to get us out of the transaction, but we made it clear to them that we wanted to be out of it by June 30th.

. . . .

Q: Now, do you see in this E-mail [still discussing Grand Jury exhibit 11] where it says, "And someone should be working on a backstop, as you will not be able to extend Merrill, and I understand that there are accounting ramifications if Enron repurchases"?

Now, do you have any understanding about whether or not Merrill could extend past June 30th?

A: I don't know anything about that.

Q: Okay. And under—if it was a true sale and if Merrill purchases something, there would be no extension needed. I mean Merrill has

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the asset and until somebody comes along and buys it, they have it; correct?

A: Correct.

. . . .

Q: Now, do you see in this document [LJM–2 document, Grand Jury Exhibit 18] . . . in the first sentence where it says, "Enron sold barges to Merrill Lynch in December of 1999, promising that Merrill would be taken out by sale to another investor by June 2000."

Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: In—no, I don't—the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

Q: So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?

A: No.

. . . .

Q: [Discussing America's Credit Flash Report for the week ending 12/23/99, Grand Jury Exhibit 9] And let me now direct your attention to the paragraph on the Nigerian barge project.

Now, do you see where it says . . . , "IBK [Merrill] was supportive based on Enron relationship, approximately $40 million in annual revenues, and assurances from Enron management that we will be taken out of our $7 million investment within the next three to six months."

Does that accord with your understanding of the transaction?

A: No. I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort.

If assurance is synonymous with guarantee, that is not my understanding.

Q: Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A: It’s inconsistent with my understanding of what the transaction was.

If assurance is interpreted to be more along the lines of strong comforts or use of best efforts, that is my understanding.

Q: [Discussing the Merrill appropriation request for the Enron/Merrill barge transaction, Grand Jury exhibit 7] . . . Do you see where it says, “Take out,” where it says, “project start/finish,” and it says, “Needs to close by 12/31/99”? And I’d for now like to focus on the part where it says, “Take out by June 30th, 2000.”

A: Yes, sir.

Q: Does that comport with your understanding of the transaction, that the finish of the project was June 30th of 2000 when there would be a take out?

A: You know, “take out” could mean that the anticipated time frame of the investment runs through that period, or in my mind it could, or it could mean some sort of legal take out. So I really—I can’t draw a conclusion from just those words.

Q: Do you see where it says “maturity”?

. . .

A: Yes.

Q: And its says “less than 6 months”?

A: Yes.

Q: Do you have any understanding why it would say “less than six months” if the terms of the agreement are open-ended?

A: Well, I’d be speculating but I would assume that that would reflect—at least my understanding or whoever wrote this’s understanding, that the anticipated hold period was less than six months.

Q: But if the contract between the parties is an open-ended investment, why does the maturity just say less than six month[s] when the terms of the contract bring Merrill Lynch well beyond six months?

A: I don’t know.

. . . .

Q: . . . Again, do you have any information as to a promise to Merrill that it would be taken out by sale to another investor by June 2000?

A: In—no, I don't—the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

Q: So you don't have any understanding as to why there would be a reference [in the Merrill Lynch document] to a promise that Merrill would be taken out by a sale to another investor by June of 2000?

A: No.

Brown makes three primary arguments: first, that he testified truthfully as to his subjective understanding of the barge deal; second, that the questions posed to him before the grand jury were too "vague and ambiguous" to support a perjury conviction; and third, that any misrepresentations by Brown were not material and thus cannot sustain a conviction under 18 U.S.C. § 1623. Each of these arguments is properly characterized as an attack on the sufficiency of the evidence.[16] Consequently, "[w]e ask whether a rational trier of fact could have found that the evidence established the elements of the offense beyond a reasonable doubt.'' *United States v. Holmes,* 406 F.3d 337, 351 (5th Cir. 2005).

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[16] Brown mischaracterizes his challenges as a legal sufficiency challenge, which we would review *de novo.* It is clear, however, that Brown's challenge is to the sufficiency of the evidence. *See, e.g., United States v. Abrams,* 568 F.2d 411, 417 (5th Cir. 1978) (holding that when examining a jury's determination that the defendant "gave false testimony", "[t]he applicable standard of review is not whether we think the evidence sufficient but whether a reasonable jury could so conclude beyond a reasonable doubt."); *United States v. Bell,* 623 F.2d 1132, 1136 (5th Cir. 1980) ("the prevailing view is that the defendant's understanding of the question is a matter for the jury to decide"); *United States v. Gaudin,* 515 U.S. 506, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995) (holding that materiality is an element of perjury and thus a question for the consideration of the jury).

First, Brown argues that the evidence presented is insufficient to support a reasonable juror's finding that his testimony was untruthful. We disagree. Along with other circumstantial evidence of Brown's knowledge of the details of the transaction, the Government presented the following:

1. Brown was approached in late December 1999 by Furst, who explained that Enron Treasurer Jeff McMahon ''asked Merrill to purchase $7 [million] of equity in a special purpose vehicle that would allow Enron to book $10 [million] of earnings'', and that the transaction ''must close by 12/31/99.'' Furst further explained to Brown that ''Enron is viewing this transaction as a bridge to permanent equity and they believe [Merrill's] hold will be for less than six months.''

2. Brown was a part of a conference call on December 22, 1999 (the Trinkle call) in which Brown, Bayly, Furst and others, all Merrill Lynch employees, but excluding lawyers, discussed Enron's need to close the deal to achieve needed revenue goals. Further, it was noted that Enron told Merrill that it would help find a third party buyer and that, if a third party buyer was not secured by June 30, 2000, Enron would repurchase the barges from Merrill. At some point during the call, Bayly asked whether a written assurance of Enron's promise was available, and someone responded that a writing was not possible because such an assurance would prevent Enron from receiving the accounting treatment it was seeking from the deal.

3. Three versions of the engagement letter were circulated among Brown and others, the final draft being executed by Brown on behalf of Merrill. The initial draft of the engagement letter included reference to Enron's buyback guarantee. On December 28, Boyle sent out a second draft of the letter with ''strike-through'' indicating the proposed

removal of all references to the buyback guarantee. The final executed version of the engagement letter contained no reference to the buyback guarantee.

4. Finally, Brown's own e-mail in March 2001, more than a year prior to his grand jury testimony, plainly stated that "we had Fastow get on the phone with Bayly and lawyers and promise to pay us back *no matter what.*"[17] (Emphasis added.)

Based on this proof, a reasonable jury could have found that the evidence was sufficient to conclude that Brown's answers were untruthful. Brown further argues that his testimony was not actually false, as he never denied knowledge of some "understanding" or "comfort" between Enron and Merrill as to the buyback; rather, he merely denied knowledge of a "promise" of such a side-deal. This distinction and the spin placed on selective and hypertechnical word choice provides no refuge from the jury's verdict. "[I]f after conviction the defendant offers 'a contrived hypertechnical or lame interpretation of his answer' . . . the jury's decision must be left undisturbed." *Bell,* 623 F.2d at 1136 (quoting *United States v. Clifford,* 426 F.Supp. 696, 704 (E.D.N.Y. 1976) (citations omitted)). Based on this proof, a reasonable jury could have found that the evidence was sufficient to conclude that Brown knew that oral agreements had been made and that Brown's answers before the grand jury were untruthful.

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[17] Brown, who was not a party to the "Fastow call," argues that the e-mail is inadmissible hearsay and that it is unreliable and fails to provide evidence that his grand jury testimony was false. However, the e-mail is admissible as non-hearsay under Federal Rule of Evidence 801(c) to reveal Brown's state of mind, *i.e.*, his belief that the side deal had been entered into and confirmed by Fastow. Additionally, although Brown argues that any knowledge he had of the call was based on hearsay, the e-mail is admissible against him under Rule 801(d)(2)(A) as an admission by a party opponent. Despite Brown's contentions to the contrary, a reasonable jury could consider such an admission reliable and reject Brown's proffered explanation that the e-mail was an exaggeration of "the strength of the promise [made by Fastow] . . . ."

Second, Brown argues that the grand jury questions were "fundamentally ambiguous". Our review of this testimony convinces us that the questions posed adequately conform with the principle that "[p]recise questioning is imperative as a predicate for the offense of perjury," *Bronston v. United States,* 409 U.S. 352, 358, 93 S. Ct. 595, 34 L.Ed.2d 568 (1973). There is no indication that Brown struggled to understand or actually misunderstood the meaning of the questions. Brown's answers were carefully responsive to the questions posed. Brown's caution in his word choice, using words like "comfort" and "best efforts," rather than "assurance," "promise," or "guarantee," indicates he was keenly aware of the thrust of the prosecutor's questions.

Finally, Brown's third argument challenging the materiality of his answers is two-fold: First, he contends that any knowing misrepresentations that he may have made were not material to the grand jury investigation; second, he argues that the refusal of the District Court to admit the entirety of his grand jury testimony was error, because consideration of that evidence would have prevented the jury from believing his testimony to be material. Materiality under § 1623 requires only that the defendant's statements "[had] a 'natural tendency to influence, or [were] capable of influencing, the decision of the decisionmaking body to which it is addressed.'" *United States v. Gaudin,* 515 U.S. 506, 509, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995) (quoting *Kungys v. United States,* 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L.Ed.2d 839 (1988)); *see also Abrams,* 568 F.2d at 421 (same). The Government does not have to demonstrate that the grand jury was *actually* hindered in any way by the falsehood. *See Abrams,* 568 F.2d at 421 ("Actual impediment of the investigation is not required . . . . Grand jurors are capable of judging credibility and they are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer."). The central issue before the grand jury at the time of Brown's testimony was whether there was an oral buyback guarantee between Enron and Merrill and if there was such an agreement, who was culpable. Any testimony by Brown relating to the existence of the agreement, or his knowledge or understanding about that agreement, was necessarily material to the inquiry of the grand jury.[18] Brown's argument to the contrary is meritless.

Brown's second argument as to materiality is that the District Court erroneously excluded his entire grand jury testimony. This evidentiary ruling is reviewed for an abuse of discretion. *United States v. Walker,* 410 F.3d 754, 757 (5th Cir. 2005) (citing *United States v. Phillips,* 219 F.3d 404, 409 (5th Cir. 2000)). Brown contends that it was impossible for the trial jury to determine if his statements were perjurious without seeing the context in which they were given. The District Court reviewed Brown's proffered testimony and declined to admit it, finding that "the questions . . . and answers" contained therein "are not genuinely in question," and concluding that the testimony was not relevant and would lead to jury confusion. We have reviewed the record, including the proffered testimony, and find no abuse of discretion by the District Court.

For the reasons given, we find no reason to upset the jury verdict and accordingly, affirm Brown's conviction for perjury before a grand jury.

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[18] The materiality requirement of § 1623 has been satisfied in cases where the false testimony was "relevant to any subsidiary issue or [wa]s capable of supplying a link to the main issue under consideration." *United States v. Griffin,* 589 F.2d 200, 207 (5th Cir. 1979) (noting that "[t]he testimony need not be directed to the primary subject under investigation"). Consequently, it appears that even if Brown's falsehood was relevant only as to his participation in the buyback agreement (and was not, as Brown argues, material to the existence of the buyback itself) the materiality requirement of § 1623 is still satisfied.

B

Brown next argues that even if the perjury conviction must be sustained, there is no basis for the verdict on obstruction of justice. Obstruction of justice is defined in 18 U.S.C. § 1503(a) as "corruptly . . . endeavor[ing] to influence, obstruct, or impede . . . the due administration of justice." 18 U.S.C. § 1503(a) (1996). This clause "clearly forbids *all* corrupt endeavors to obstruct or impede the due administration of justice." *United States v. Williams,* 874 F.2d 968, 977 (5th Cir. 1989) (emphasis in the original). Brown contends, however, that where false testimony alone is the basis for the offense, "it still must be shown to have the effect of impeding justice." Brown essentially argues that perjury and obstruction are separable and distinct offenses; consequently, the mere fact that one perjures himself does not mean that he has obstructed justice.[19] Thus, the obstruction conviction must be reversed because "[t]he government introduced no evidence . . . [to] establish that Brown's testimony had any effect (actual, natural, or probable) on the Grand Jury proceeding."

Brown's argument is reasoned and appealing. Nevertheless, our precedent makes clear that material false testimony regarding one's knowledge of the subject matter of a grand jury investigation has an effect beyond its falsity; it also impedes the investigation of the grand jury. In both *United States v. Griffin,* 589 F.2d 200 (5th Cir. 1979), and *Williams,* the defendants testified falsely to a grand jury by giving "evasive answer[s]" and "denials of knowledge" relating to the subject of the grand jury inquiry. In both cases, the defendants, like Brown, argued that their § 1503 convictions must be reversed as the Government had not presented independent evidence that these falsehoods actually impeded the grand jury. Writing for this Court, respectively, both Judges Wisdom and Garwood rejected those contentions, finding that "the denials of knowledge had the effect of closing off entirely the avenues of inquiry being pursued, namely, *what appellants knew about the subject under investigation.*" *Williams,* 874 F.2d at 981 (emphasis added); *see also Griffin,* 589 F.2d at 204. As explicated by Judge Wisdom, "[b]y falsely denying knowledge of events and individuals when questioned about them, [the defendant] hindered the grand jury's attempts to gather evidence [of the alleged scheme] as effectively as if he refused to answer the question at all." *Griffin,* 589 F.2d at 204. Consequently, the "testimony had the effect of impeding justice."[20] *Id.*

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[19] We acknowledge this argument is well reasoned and persuasive. However, under the precedent of this circuit, as discussed *infra,* false testimony as to one's *knowledge* relating to the subject of a grand jury inquiry does in fact establish obstruction; not because the perjury *ipso facto* establishes obstruction, but because the perjurious testimony has the effect of "closing off entirely the avenue[] of inquiry being pursued." *Williams,* 874 F.2d at 981.

Brown attempts to distinguish his case, arguing that he testified of his own free will, that he answered every question, and that he never directly denied knowledge of the Fastow conversation. Consequently, he cannot be found to have obstructed the grand jury. Brown's argument, however, presupposes that his "voluntary" and "complete" testimony was true—a presupposition rejected by the jury's conviction of perjury. Given our precedent, we see no principled reason that justifies different treatment of Brown's untruthful testimony and denials of knowledge; as much as the defendants in *Griffin* and *Williams,* Brown "closed off entirely the avenue being pursued," namely, his knowledge or understanding of what actually occurred. We are bound by the precedent of this Circuit, and under that precedent, no other proof of impediment is required to demonstrate obstruction under § 1503. *Williams,* 874 F.2d 968; *Griffin,* 589 F.2d 200.[21]

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[20] Because the testimony in *Griffin* and *Williams* did in fact impede the grand jury, both cases declined to determine whether perjury before a grand jury "*ipso facto* constitutes a violation of section 1503," *see Griffin,* 589 F.2d at 204; *Williams* 874 F.2d at 980.

Given the evidence presented by the government that Brown's testimony was false, and the jury's apparent acceptance of that evidence, Brown's perjurious testimony had the effect of "closing off entirely the avenue[] of inquiry being pursued." *Williams,* 874 F.2d at 981. Consequently, Brown's testimony was corruptly attempting to influence the administration of justice in violation of § 1503. As such, we affirm Brown's conviction for obstruction of justice.

VI

We sum up as follows: The convictions of each of the Defendants for conspiracy and wire fraud are VACATED; the District Court's denial of Fuhs's motion for judgment of acquittal is REVERSED and his convictions are VACATED; and the conviction and sentences of Brown on charges of perjury and obstruction of justice are AFFIRMED.

REVERSED in part; VACATED in part; and AFFIRMED in part.

REAVLEY, Circuit Judge, concurring in part and dissenting in part:

I concur in the dismissal of charges against Fuhs because of the insufficiency of the evidence at the stage of the end of the government's case-in-chief. And I concur in affirming Brown's convictions for perjury and obstruction of justice. I would, however, affirm the judgment against Brown, Bayly and Furst for conspiracy and wire fraud.

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[21] Brown repeatedly cites *In re Michael,* 326 U.S. 224, 66 S. Ct. 78, 90 L.Ed. 30 (1945), for the proposition that an obstruction conviction based on perjury alone cannot stand. However, *Griffin* squarely rejected that argument. 985 F.2d at 205–06. *See also Williams,* 874 F.2d at 979.

The government's theory of wire fraud relating to the deprivation of honest services is warranted by 18 U.S.C. § 1346 because it applies to the behavior in this case. While the majority recognizes that the government provides a "very plausible, even strong case for a criminal deprivation of honest services," it goes on to hold that the scheme as alleged in the indictment falls outside the scope of honest services fraud, and unnecessarily sets up a new "demilitarized zone" for the honest services fraud theory. ("[W]here an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.").

Both our pre- and post-*McNally* case law supports the honest services fraud theory alleged in the indictment and proven at trial. To prove a violation of the honest services branch of the federal fraud statutes, the government must prove that a defendant deprived his employer of services under state law. *United States v. Caldwell,* 302 F.3d 399, 409 (5th Cir. 2002); *United States v. Brumley,* 116 F.3d 728, 734 (5th Cir. 1997) (en banc) (the employee "must act or fail to act contrary to the requirements of his job under state law"). In *United States v. Ballard,* 663 F.2d 534, 535 (5th Cir. 1981), this court held that

> a breach of fiduciary duty of honesty or loyalty involving a violation of the duty to disclose could only result in criminal mail fraud where the information withheld from the employer was material and that, where the employer was in the private sector, information should be deemed material if the

> employee had reason to believe the information would lead a reasonable employer to change its business conduct.

See also United States v. Gray, 96 F.3d 769, 774–75 (5th Cir. 1996) (same); *United States v. Fagan,* 821 F.2d 1002, 1009 (5th Cir. 1987) (same). This court has held that "a breach of fiduciary duty can constitute illegal fraud . . . only when there is some detriment to the employer." *Ballard,* 663 F.2d at 540. The court went on to find that the detriment can be a deprivation of an employee's faithful and honest services if a violation of the employee's duty to disclose material information is involved. *Id.* Thus, this court has focused its inquiry on the duty to disclose and materiality.[1]

The indictment alleges that "[a]s Enron employees, Fastow, Glisan, [and] Boyle . . . each owed a duty to Enron and its shareholders to provide the company with their honest services." Count One then alleges that the defendants conspired to devise a scheme or artifice to defraud Enron and its shareholders "of the intangible right of honest services of its employees" and that they used "materially false and fraudulent pretenses, representations, and promises" in the process. Counts Two and Three reiterate those allegations for the substantive wire fraud offenses.

The evidence at trial proved that Fastow, Glisan, Boyle, and McMahon, and other Enron personnel temporarily "parked" the barges with Merrill Lynch so that Enron could meet its earnings. The defendants never disputed that

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[1] I note that the Second Circuit in *United States v. Rybicki,* 354 F.3d 124, 145–46 (2d Cir. 2003), a case involving a kickback scheme, followed the lead of this court and adopted the materiality test in lieu of the reasonably foreseeable harm test. The court found that private sector honest services cases fall into two general categories: bribery or kickbacks and self-dealing. *Id.* at 139. While certainly these type of cases fit comfortably into the plain meaning of § 1346, honest services fraud is not limited to those categories, and any implication otherwise is unjustified.

Fastow, Glisan, Boyle, and McMahon were senior Enron executives and managers that owed a fiduciary obligations under state law to Enron and its shareholders. These fiduciary obligations included the duty of loyalty, fair dealing, and candor. The Enron executives and managers breached their fiduciary duties by "cooking" Enron's books and engaging in the fraudulent "sale" of the barges to Merrill Lynch, withholding this information from Enron and its shareholders, and causing Enron to pay nearly $1.5 million to Merrill Lynch and LJM2 to hold the barges, along with paying compensation bonuses to APACHI executives that depended on the completion of the barge transaction.

In sum, the government proved that the defendants' scheme involved withholding material information from Enron and its shareholders and caused a detriment to Enron and its shareholders. Given that our pre- and post-*McNally* case law supports the honest services fraud theory alleged in the indictment and proven at trial, this should end the matter. To distinguish this case from previous cases, the majority relies on two important propositions: (1) that the barge transaction was intended to serve a corporate purpose/goal, ("This case, in which Enron employees breached a fiduciary duty in pursuit of what they understood to be a corporate goal, presents a situation in which the dishonest conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest."); and (2) that there could no honest services violation because certain Enron executives knew all of the specifics of the barge deal and sanctioned the transaction, ("Enron's corporate incentive policy coupled with senior executive support for the deal (the deal was sanctioned by Fastow, Enron's Chief Financial Officer), which together created an understanding that Enron has corporate interest in, and was a willing beneficiary of, the scheme."). I object to both justifications for the conspiracy.

First, the barge transaction did not serve the purpose of Enron's shareholders, and it cost Enron nearly $1.5 million, plus compensation to APACHI executives, that it should not have had to pay. Most important, falsifying Enron's books does not serve a legitimate corporate purpose, even if it temporarily made Enron's finances appear more attractive to the investing public in the short term. Second, it is no defense that the defendants' co-conspirators included high-ranking executives at Enron. The fact that those co-conspirators were aware of defendants' conduct does not excuse defendants' actions. But most important, Enron *executives* are not Enron itself and, in any event, they owed a fiduciary duty to Enron *and* its shareholders.[2]

I conclude that the behavior of the defendants falls squarely within the meaning of a "scheme or artifice to deprive another of the intangible right to honest services," measuring it against our pre- and post-*McNally* case law. I therefore respectfully dissent.

DeMOSS, Circuit Judge, concurring in part and dissenting in part:

I join without reservation Judge Jolly's opinion with respect to the honest services theory of the Indictment and the issue of insufficiency of the evidence as to Fuhs. However, I write separately to explain two additional points with respect to the honest services charge and to dissent with respect to Brown's convictions for perjury and obstruction of justice.

I.

With respect to § 1346 and the honest services theory, I would reach the Defendants' constitutional challenge and also point out the multiple and troubling problems with the Government's theory of applying § 1346 to these facts, even though the majority opinion disposes of the Defendants' appeal.

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[2] For these two reasons, I find the majority's attempt to distinguish and limit *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), to be unpersuasive.

In our *Brumley* dissent, Judge Jolly and I did our best to point out the ambiguities in the text of § 1346 that gave us grave reservations about the statute's application. While we did not there call into question the statute's constitutionality as applied, 116 F.3d at 736 (Jolly and DeMoss, JJ., dissenting), I have since then twice had occasion to address § 1346. *See United States v. Griffin,* 324 F.3d 330, 356 (5th Cir. 2003); *United States v. Evans,* 148 F.3d 477 (5th Cir. 1998). The Defendants have raised here a constitutional challenge to § 1346, and in my view the panel should now address that issue. Years of review of the application of § 1346 to varied facts persuade me that the constitutionality of § 1346 may well be in serious doubt. A federal criminal statute must define the crime "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983). Section 1346's text is undeniably vague and ambiguous and is subject to wide variation in application by the lower courts. Rather than address the larger constitutional problem with this statute, which would provide clarity to Congress, prosecutors, and the lower courts, the circuit courts have instead only clouded the meaning of § 1346 by repeatedly resolving the ambiguities of the statute's text via judicially created definitions and limitations. Our Court and our sister circuits end up doing precisely what most would say we lack the constitutional power to do, that is, define what constitutes criminal conduct on an ex post facto and ad hoc basis. In this regard, I add my voice to the dissenters in *Rybicki.* 354 F.3d at 163–65 (Jacobs, J., dissenting). Congress should repair this statute that, in my opinion, fails to provide the requisite "minimal guidelines to govern law enforcement." *Id.* at 358, 103 S. Ct. 1855.

Additionally, the application of § 1346 to the facts presented in this case is particularly problematic for several reasons, the combination of which poses an even greater harm to future business relationships and transactions than would any one of the problems alone. The Government's extension of the already ambiguous reach of § 1346 by way of an indictment for conspiracy to commit honest services fraud is especially troublesome. While § 1346's text offers little guidance on the scope of the crime's application, *see Brumley,* 116 F.3d at 741–42, 746 (Jolly and DeMoss, JJ., dissenting), at a minimum the word "services" has been in the past the basis for the statute's pre-*McNally* application to the employer/employee relationship. *See id.* at 734 (Higginbotham, J., majority opinion). To the extent that pre-*McNally* case law required a relationship that generated a duty of honest services, such a relationship does not exist in this case between the Defendants, who are employees of Merrill, and Enron or its shareholders, who are the purported victims of the alleged fraud. The limitation of criminal activity to relationships giving rise to a duty of honest services is ignored when any person who negotiates with an employee of another corporation is potentially entangled by the combination of § 1346 with our very broad understanding of conspiracy.

I also believe that a serious problem arises with respect to the Government's theory of harm in this case. It is absolutely undisputed that Merrill paid $7 million to Enron as a result of the closing of the transaction contemplated by the Engagement Letter of December 29, 1999 that was the final written agreement of the two parties ("the Engagement Letter"). Even granting the Government that Enron paid back $250,000 as the advisory fee to Merrill, Enron still had $6,750,000 more in its bank account as a result of the Engagement Letter than it had before. The Government's theory of harm would have us ignore the initial gains to Enron and focus solely upon some later loss only tangentially connected to the particular investment transaction that forms the basis of the Indictment.

The cumulative effect of a vague criminal statute, a broad conception of conspiracy, and an unprincipled theory of harm that connects the ultimate demise of Enron to a single transaction is a very real threat, of potentially dramatic proportion, to legitimate and lawful business relationships and the negotiations necessary to the creation of such relationships.

II.

I dissent from the portion of the majority opinion that affirms the convictions of Brown for perjury and obstruction of justice. I cannot agree with the majority that on this record, particularly the portions quoted in the majority opinion, a reasonable jury could conclude that Brown's allegedly perjurious statements were in fact false. Brown argues that his testimony was true because it represented his subjective understanding of the transaction contemplated by the Engagement Letter. I agree. The majority relies primarily upon four points of evidence to support its assertion of falsity: Furst's explanations to Brown that Enron viewed the deal as a "bridge to permanent equity"; the discussions of the December 22 conference call; working drafts of the Engagement Letter transmitted between Merrill and Enron that were never signed; and Brown's own e-mail of March 2001. These four points, along with other circumstantial evidence, comprise two types of evidence: (1) business negotiations preceding a deal ultimately reduced to a written agreement and (2) an after-the-fact oversimplification and shorthand description of the barge partnership investment by Merrill employees during the discussion and evaluation of a subsequent and entirely unrelated deal. Neither of these types of evidence should be used to support an inference of the falsity of Brown's testimony.

The evidence regarding both working drafts of the Engagement Letter and discussions between employees of

Enron and employees of Merrill leading up to the final written agreement are simply the heart and soul of business negotiations and should not indicate the character of the ultimate business transaction. Some negotiations may ultimately be reflected in the final written agreement, but some may not. Here, negotiations are no evidence of the actual nature of the deal because there was no legally enforceable take-out promise in the final written agreement; instead, the parties merely bargained for Enron's best efforts to continue to market Merrill's investment interest in the barge partnership to the mutual benefit of both companies.

Such an agreement does not undermine the nature of the transaction as set forth in the Engagement Letter that was ultimately agreed to and signed by both parties. Employees of Enron and Merrill may well have considered a buy-back agreement, promise, or guarantee during the negotiations leading up to the barge deal; the evidence would certainly permit a reasonable jury to so conclude. But the final written agreement excludes this term. Instead, the parties relied upon their established business relationship and discussions of best efforts and strong comfort that Enron would continue its efforts to find a third-party buyer for Merrill's interest in the barge partnership. The conversations preceding the deal are only negotiations, and the ultimate written agreement speaks for itself. Two material facts corroborate this reading: (1) Fastow himself averred to the Government that he, in fact, made only assurances of best efforts to Merrill, not promises or guarantees to take Merrill out of the deal; and (2) in conformance with the written agreement, Merrill actually paid $7 million to Enron, consistent with its purchase of an interest in the barge partnership investment, and therefore had absolutely no legally enforceable claim to be taken out of the deal. The Government mischaracterizes the transaction evidenced by the Engagement Letter when it labels the agreement a ''sham'' and asserts that Merrill was never ''at risk'' during the transaction. The Engagement Letter expressly states, ''No waiver, amendment, or other modification of this Agreement shall be effective unless in writing and signed by the parties to be bound.'' Likewise, the Engagement Letter also includes the following provision: ''This Agreement incorporates the entire understanding of the parties with respect to this engagement of Merrill Lynch by Enron, and supercedes all previous agreements regarding such engagement, should they exist.'' In light of these provisions, Merrill's $7 million was absolutely at risk. Any oral assurances of a take-out offered to Merrill by any Enron employee would not have been legally binding on Enron.

In my view, both parties acted to maximize mutual benefits in a clear effort to solidify a business relationship. Both parties relied on the good faith of each other in laying a foundation for continued business relationships. Merrill could not have enforced Enron's assurance of its best efforts commitment to remarket the investment interest that Merrill had agreed to purchase; Merrill could only have refused to deal with Enron in the future if the Engagement Letter had resulted in an unsatisfactory business investment. Such negotiations should not be the fodder for criminal indictments. If there is any criminal wrong arising from the facts in this record, and I have serious doubts on that score, it would be in Enron's employees' reporting of the transaction described in the Engagement Letter, not in the manner in which Merrill's employees negotiated the deal.

Brown's March 2001 e-mail was not a statement under oath; rather, it was a statement made to another Merrill colleague fifteen months after the Engagement Letter transactions that discussed a proposed loan transaction with a potential borrower, a large corporate entity entirely unrelated to Enron (referred to in the email as ''CAL''). The talking point in the e-mail was whether Merrill would be a secured or an unsecured lender in the proposed deal. The pertinent part of the e-mail reads,

> If it[']s as grim as It sounds, I would support an unsecured deal provided we had total

> verbal [a]ssurance from CAL ceo or Cfo, and [S]hulte was strongly vouching for it. We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what. Deal was approved and all went well. What do you think?

The text of the e-mail reveals that Brown was attempting to use the success of the earlier deal with Enron to persuade a colleague that the deal with CAL would likewise be successful. In the email, Brown did not distinguish the two deals. But the Enron deal and the CAL deal discussed in the e-mail differ in at least one important respect: the Enron deal involved the sale of an equity interest in an Enron partnership to Merrill and the CAL deal involved a loan by Merrill to CAL for funds to be used in building an extension to CAL's facilities. At the time the e-mail was written, Brown may have remembered the Enron deal as some sort of loan by Merrill to Enron; however, the Engagement Letter and the evidence before the jury reveal no such transaction. No legally enforceable promise was ever made to take Merrill out of the Enron deal. Accordingly, no reasonable jury could construe the e-mail as anything but an overly simplified, shorthand description of the barge investment made after the fact in an effort to secure a subsequent, entirely unrelated deal. Under this reading of the email, Brown's testimony before the Grand Jury was not inconsistent with the text of the email because there simply was no promise or guarantee regarding a take-out in the Enron deal. The questions posed by the Grand Jury related only to an enforceable take-out, not to an oral "promise to pay us back no matter what," and Brown's answers to those questions therefore do not conflict with his statements in the e-mail.

Finally, the Government's own evidence supports a conclusion that the only comfort offered to Merrill was that Enron would use its best efforts to sell to a third party. A reasonable jury could not convict Brown of perjury where the Government speaks out of both sides of its mouth with respect to the allegedly perjurious testimony. The Government simultaneously proffers the identical words as both evidence of Brown's guilt of perjury when the words are spoken by Brown and as evidence of the nature of the Enron transaction not being a sale when offered by the Government's own witnesses.

I conclude, therefore, that no reasonable jury could conclude that Brown's testimony before the Grand Jury was false. Accordingly, I must conclude that no reasonable jury could convict Brown of perjury. *See* 18 U.S.C. § 1623. Moreover, the sole basis in the Indictment for the charge against Brown of obstruction of justice, *see* 18 U.S.C. § 1503(a), was Brown's allegedly false statements to the Grand Jury. Accordingly, I would also conclude that no reasonable jury could find Brown guilty of obstruction of justice on this record.

For the foregoing reasons, I would reverse the conviction of Brown on the perjury and obstruction of justice counts.

UNITED STATES OF AMERICA

v.

James A. BROWN

Case Number: 4:03CR00363-002

United States District Court

Southern District of Texas

Holding Session Houston

May 5, 2005

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty on counts 1SSS, 2SSS, 3SSS, 4SSS, and 5SSS on November 3, 2004 after a plea of not guilty.

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to commit wire fraud and falsify books and records	01/31/2001	1SSS
18 U.S.C. §§ 1343 & 2	Wire fraud, aiding and abetting	12/29/1999	2SSS
18 U.S.C. §§ 1343 & 2	Wire fraud, aiding and abetting	06/28/2000	3SSS
18 U.S.C. § 1623	Perjury before the Enron grand jury	09/25/2002	4SSS
18 U.S.C. § 1503	Obstruction of the Enron grand jury investigation	09/25/2002	5SSS

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 21, 2005 – Date of Imposition of Judgment
/S/ EWING WERLEIN JR.
UNITED STATES DISTRICT JUDGE
May 4, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 46 months.

This term consists of FORTY SIX (46) MONTHS as to each of Counts 1SSS, 2SSS, 3SSS, 4SSS and 5SSS, to run concurrently, for a total of FORTY SIX (46) MONTHS.

The court makes the following recommendations to the Bureau of Prisons:

> That the defendant be designated to a minimum security prison facility.
>
> That the defendant be designated to the Federal Prison Camp in Schuylkill in Minersville, Pennsylvania, if possible.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 1 year. This term consists of ONE (1) YEAR as to each of Counts 1SSS, 2SSS, 3SSS, 4SSS, and 5SSS, to run concurrently, for a total of ONE (1) YEAR.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reason;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer, any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant is required to participate in a mental health program as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such program, based on ability to pay as determined by the probation officer.

The defendant is required to provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

The defendant is prohibited from possessing a credit access device, such as a credit card, unless first authorized by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$500	$250,000	$590,000

A $100 special assessment is ordered as to each of Counts 1SSS, 2SSS, 3SSS, 4SSS, and 5SSS, for a total of $500. A $250,000 fine is ordered as to each of Counts 1SSS, 2SSS, 3SSS, 4SSS, and 5SSS, to run concurrently, for a total of $250,000.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss	Restitution Ordered
Enron Corporation Robert Walls, Jr. General Counsel		$590,000
TOTALS	$0.00	$590,000.00

The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of $500 due immediately, balance due not later than May 21, 2005;

F. Special instructions regarding the payment of criminal monetary penalties: Make all payments payable to: U.S. District Court, Attn: Finance, P.O. Box 61010, Houston TX 77208.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names

4:03CR00363-004 Daniel O. Boyle

Total Amount	**Joint and Several Amount**
$295,000	$295,000

Payment shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
CR. No. H-03-363
Jan. 28, 2005

UNITED STATES OF AMERICA
v.
DANIEL BAYLY
DAN O. BOYLE
JAMES A. BROWN
WILLIAM R. FUHS
ROBERT S. FURST

ORDER

At the close of the evidence offered by the Government, and again at the close of all the evidence, Defendants each moved for judgments of acquittal, and the Court reserved decision on the motions at the time they were made. *See* FED. R. CRIM. P. 29. The Jury returned its verdict on November 3, 2004. All Defendants except Sheila Kahanek, who the Jury found was not guilty on all accounts, and Dan O. Boyle, have filed renewed Motions for Judgment of Acquittal. The five Defendants as to whom guilty verdicts were returned have also filed Motions for New Trial. Additionally, Defendants James A. Brown and Robert S. Furst have filed Motions challenging the sentencing phase of the trial and supplemental verdict returned by the Jury.[1] The Government has filed a consolidated response to Defendants' Rule 29 and 33 motions, and Defendants Bayly, Brown, Furst, and Fuhs have replied to the Government's response.

A post-verdict motion for judgment of acquittal is judged by the same standard as a motion for judgment of acquittal at the close of the government's evidence or at the close of all of the evidence. The Court is required to consider "if the evidence is insufficient to sustain the conviction." United States v. Burns, 597 F.2d 939, 941 (5th Cir. 1979).

The late distinguished scholar Charles Alan Wright succinctly described the separate standards that apply to a motion for judgment of acquittal and a motion for new trial, and his text is republished (with the addition of three words) in the current edition of Federal Practice and Procedure:

> On a motion for judgment of acquittal, the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt, the motion for acquittal must be denied.
>
> On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the

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[1] Defendant Brown requests a judgment of acquittal or, in the alternative, a new trial on sentencing, and Defendant Furst requests that the Court set aside the Jury's findings on the sentencing enhancements.

> verdict may be set aside and a new trial granted.
>
> It has been said in older cases that on such a motion the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

3 WRIGHT, KING & KLEIN, FEDERAL PRACTICE AND PROCEDURE § 553 (3d ed. 2004) (footnotes with citations omitted).

After having carefully considered separately with respect to each of Defendants Bayly, Boyle, Brown, Fuhs, and Furst, both sets of motions for acquittal (made at the close of evidence offered by the Government, and again at the close of all of the evidence), on the basis of the evidence at the time the ruling in each instance was reserved, and having considered the post-verdict motions for judgment of acquittal filed by Defendants Bayly, Brown, Fuhs, and Furst, it is

ORDERED that each of the motions for judgment of acquittal made by Defendants Bayly, Boyle, Brown, Fuhs, and Furst is DENIED. In so holding, the Court concludes that there is substantial evidence justifying an inference of guilt with respect to each of these Defendants with respect to the counts of conviction. *See* FED. R. CRIM. P. 29.

This was a strongly contested trial in which both sides and all parties were very well represented. Both the Government and all Defendants skillfully elicited favorable testimony and forcefully argued reasonable inferences that could be drawn from the evidence that were favorable to their side of the case. Their arguments and the instant submissions reflect again outstanding advocacy on behalf of all parties. After having weighed the evidence received at trial and considered the credibility of the witnesses, and after having carefully considered the arguments presently submitted, the Court concludes that this is not one of those exceptional cases in which the evidence preponderates heavily against the verdicts or persuades the Court that a miscarriage of justice has resulted. In sum, the interests of justice do not require a new trial. FED. R. CRIM. P. 33. Accordingly it is

ORDERED that the Motions for New Trial or Alternative Motions for New Trial filed by Defendants Bayly, Boyle, Brown, Fuhs, and Furst, are in all things DENIED.

United States v. Booker, __ S. Ct. __, 2005 WL 50108 (2005), holds that the United States Sentencing Guidelines are not mandatory but only advisory. Therefore, the sentencing phase of the trial and supplemental verdict returned by the Jury before Booker was decided, were superfluous and the supplemental verdict is not binding upon the Court or upon the recommendations made by the Probation Office on how the advisory Guidelines might apply in this case. Accordingly, the motions challenging the sentencing phase of the trial and supplemental verdict will be DENIED as moot. Based on the foregoing, it is

ORDERED that Defendant Bayly's Motion for Post-Verdict Judgment of Acquittal (Document No. 637) and Motion for New Trial (Document No. 638), are both DENIED; Defendant Brown's Post-Trial Motion for Judgment of Acquittal (Document No 645),[2] and Motion for New Trial (Document No. 43), are both DENIED, and Defendant Brown's Post-Trial Motion Pursuant to Rules 29 and 33 and Joinder in Motions all in Connection with the Second Phase of Trial (Document No. 644), is DENIED as moot; Defendant Furst's Motion for Judgment of Acquittal or, in the Alternative, to Vacate the Judgment of Conviction and Order a New Trial (Document No. 641) is in all things DENIED, and Motion to Set Aside the Sentencing Enhancements (Document No. 642) is DENIED as moot; Defendant Boyle's Motion for New Trial (Document No. 642)[3] is DENIED; and Defendant Fuhs's Renewed Motion for Judgment of Acquittal (Document No. 639) and Motion for a New Trial (Document No. 640), are both DENIED.

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[2] Defendant Brown also moves to join in Post-Trial Rule 29 Motions submitted by Co-Defendants, which is GRANTED. The adopted motions themselves are DENIED.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 27th day of January, 2005.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

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[3] This motion also requests to adopt Co-Defendants' Motions for a New Trial, which is GRANTED, although the adopted motions themselves are DENIED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
CR. No. H-03-363
November 5, 2004

UNITED STATES OF AMERICA
v.
DANIEL BAYLY
DAN O. BOYLE
JAMES A. BROWN
WILLIAM R. FUHS
ROBERT S. FURST

VERDICT

Count One

We, the jury, find the Defendant, Daniel Bayly, Guilty, of the offense charged in Count One of the Third Superseding Indictment.

We, the jury, find the Defendant, Dan O. Boyle, Guilty, of the offense charged in Count One of the Third Superseding Indictment.

We, the jury, find the Defendant, James A. Brown, Guilty, of the offense charged in Count One of the Third Superseding Indictment.

We, the jury, find the Defendant, William R. Fuhs, Guilty, of the offense charged in Count One of the Third Superseding Indictment.

We, the jury, find the Defendant, Robert S. Furst, Guilty, of the offense charged in Count One of the Third Superseding Indictment.

We, the jury, find the Defendant, Sheila Kahanek, Not Guilty, of the offense charged in Count One of the Third Superseding Indictment.

Count Two

We, the jury, find the Defendant, Daniel Bayly, Guilty, of the offense charged in Count Two of the Third Superseding Indictment.

We, the jury, find the Defendant, Dan O. Boyle, Guilty, of the offense charged in Count Two of the Third Superseding Indictment.

We, the jury, find the Defendant, James A. Brown, Guilty, of the offense charged in Count Two of the Third Superseding Indictment.

We, the jury, find the Defendant, William R. Fuhs, Guilty, of the offense charged in Count Two of the Third Superseding Indictment.

We, the jury, find the Defendant, Robert S. Furst, Guilty, of the offense charged in Count Two of the Third Superseding Indictment.

We, the jury, find the Defendant, Sheila Kahanek, Not Guilty, of the offense charged in Count Two of the Third Superseding Indictment.

Count Three

We, the jury, find the Defendant, Daniel Bayly, Guilty, of the offense charged in Count Three of the Third Superseding Indictment.

We, the jury, find the Defendant, Dan O. Boyle, Guilty, of the offense charged in Count Three of the Third Superseding Indictment.

We, the jury, find the Defendant, James A. Brown, Guilty, of the offense charged in Count Three of the Third Superseding Indictment.

We, the jury, find the Defendant, William R. Fuhs, Guilty, of the offense charged in Count Three of the Third Superseding Indictment.

We, the jury, find the Defendant, Robert S. Furst, Guilty, of the offense charged in Count Three of the Third Superseding Indictment.

We, the jury, find the Defendant, Sheila Kahanek, Not Guilty, of the offense charged in Count Three of the Third Superseding Indictment.

Count Four

We, the jury, find the Defendant, James A. Brown, Guilty, of the offense charged in Count Four of the Third Superseding Indictment.

Count Five

We, the jury, find the Defendant, James A. Brown, Guilty, of the offense charged in Count Five of the Third Superseding Indictment.

Count Eight

We, the jury, find the Defendant, Dan O. Boyle, Guilty, of the offense charged in Count Eight of the Third Superseding Indictment.

11/3/04

Mary Miller Lynch
Foreperson

UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
GJ NO. 02-2

RE: INVESTIGATION OF ENRON

BE IT REMEMBERED that on the 25th day of September, 2002, beginning at 9:48 a.m., in the Federal Building, 515 Rusk, Houston, Texas, the United States Grand Jury convened, at which time the following proceedings were had and testimony adduced as hereinafter set forth.

TESTIMONY OF JAMES ARTHUR BROWN

VOLUME I

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[Grand Jury Exhibit No. 11 marked for identification and made a part of the record.]

BY SPECIAL AUSA WEISMANN:

Q. I'm showing you Grand Jury Exhibit 11 of yesterday's date. Have you ever seen this document before?

A. No, sir.

Q. Let me show you the second part of this E-mail from Mr. Boyle. Have you ever seen this before?

A. No, sir.

Q. And I'm turning to page 2 of the document. I think that – let me start at the first – on page 2 I'm starting with the E-mail from Mr. Glisan, dated May 11, 2000.

Do you know who Mr. Glisan is?

A. I've met him before, but when I met him he was not the treasurer, but I learned from the press that he was treasurer for a brief period of time at Enron.

Q. Okay. Have you ever seen this E-mail before?

A. No, sir.

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Q. Do you see where it says, "To be clear, Ene. (Enron) is obligated to get Merrill out of the deal on our about June 30th. We have no ability to roll the structure"?

A. Yes, sir.

Q. Do you have any understanding of why Enron would believe it was obligated to Merrill to get them out of the deal on or before June 30th?

A. It's inconsistent with my understanding of what the transaction was.

Q. Okay. Have you ever seen this additional, the E-mail just above it from a Jim Hughes to Mr. Glisan[?] Have you ever seen that before?

A. No, sir.

Q. Do you know who Jim Hughes is?

A. No, sir, or not that I can recall.

Q. Okay. Do you see where he says, "We have always understood that is required. If it is non-performing, then no one will take the Merrill position and we will inherit it"[?]

A. Is that a response to the one below it?

Q. Yes, I represent that to you. And just so

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it's clear, if you look at the date and the time, the date on this is 5/11, 2000, 2:59 p.m. Do you see that at the top?

A. Uh-huh.

Q. And if you look at this one over here, it's 5/11, 2000, at 2:35. And this is Ben Glisan to a variety of different people, including a cc to Mr. Hughes.

And then if you go to this E-mail, you have – the one above it. It's Mr. Hughes and it's dated slightly later, the same day slightly later and to Mr. Glisan –

A. Right.

Q. – regarding the Nigerian barge transaction.

A. Right.

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Q. And the question to you is do you have any understanding as to whether – how or why Enron would believe that it was – it understood that is was required to use the term used in the E-mail to get Merrill

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Lynch out of the deal by June 30th?

A. I did not understand and – you know, my understanding of the transaction was that they were not required to get us out of the transaction, but we made it clear to them that we wanted out of it by June 30th.

Q. Do you see the second sentence where it says, "If it is non-performing, then no one will take the Merrill position and we will inherit it"?

In a true at-risk investment, would it be fair to say that – let's assume if something is non-performing, that there would be nothing that would obligate or require Enron to take it. Merrill Lynch could just be stuck with it, a non-performing investment?

A. That's correct.

Q. And in fact, if it was non-performing and not doing very well, in a true at-risk investment, the return might be zero?

A. I agree.

Q. Because you might not find a buyer or the buyer may pay very little and the rate of

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return might be very low and in fact zero; correct?

A. Correct, although there could be other reasons why somebody might still buy it back.

Q. Oh, absolutely.

A. For relationship purposes or whatever, but I'm not arguing with your observation.

Q. Okay. And I take it – I think this is probably obvious, but if you visit the very top E-mail, and just to make sure the record is complete, have you ever seen this E-mail?

A. No, sir.

Q. Now, do you see in this E-mail where it says, "And someone should be working on a backstop, as you will not be able to extend Merrill, and I understand that there are accounting ramifications if Enron repurchases"?

Now do you have any understanding about whether or not Merrill could be extended past June 30th?

A. I don't know anything about that.

Q. Okay. And under – if it was a true sale

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and if Merrill purchases something, there would be no extension needed. I mean Merrill has the asset and until somebody comes along and buys it, they have it; correct?

A. Correct.

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[Grand Jury Exhibit 18 marked for identification and made part of the record.]

BY SPECIAL AUSA WEISMANN:

Q. Okay. Let me just see. Le[t] me show you Grand Jury Exhibit 18 and ask you whether you have seen this.

And let me represent to you again this is an LJM document. Have you ever seen this document?

A. I don't believe I have ever seen that.

Q. Do you know an individual named Ace Roman?

A. Who?

Q. Ace Roman. Do you see the name here?

A. I don't think I've ever heard of him or her.

Q. Okay.

A. Whoever it is.

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Q. Now, do you see in this document where it describes the transaction, and the document is dated June 29th of 2000?

Do you see in the first sentence where it says "Enron sold barges to Merrill Lynch in December of 1999, promising that Merrill would be taken out by sale to another investor by June 2000"[?]

Again, do you have any information as to a promise by Merrill that it would be taken out by sale to another investor by June 2000?

A. In – no, I don't – the short answer is no, I'm not aware of the promise. I'm aware of a discussion between Merrill Lynch and Enron on or around the time of the transaction, and I did not think it was a promise though.

Q. So you don't have any understanding as to why there would be a reference to a promise that Merrill would be taken out by sale to another investor by June of 2000?

A. No.

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BY SPECIAL AUSA WEISMANN:

Q. Let me show you two more documents. These I think you may have seen before.

This is an America's Credit Flash Report, week ending 12/23/99. It's Grand Jury Exhibit 9 of yesterday's date. Have you seen this before?

A. If I have, it was in preparation for the different interviews.

Q. But not contemporaneously?

A. No, sir.

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Q. And let me now direct your attention to the paragraph on the Nigerian barge project.

Now, do you see where it says in the second-to-last line, "IBK was supportive based on Enron relationship, approximately $40 million in annual revenues, and assurances from Enron management that we will be taken out of our $7 million investment within the next three to six months"[?]

Does that accord with your understanding of the transaction?

A. No. I thought we had received comfort from Enron that we would be taken out of the transaction within six months or would get that comfort.

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If assurance is synonymous with guarantee, that is not my understanding.

If assurance is interpreted to be more along the lines of strong comfort or use best efforts, that is my understanding.

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GRAND JURY EXHIBIT 11

[E-mail header graphic]
5/12/2000 12:31 p.m.
From: Ben F. Glisan
To: James A. Hughes
Subject: Re: Nigeria Barge Transaction

I understand that the underlying deal is non-performing and have no doubt that the work being done will enhance the value of the project. I am suggesting, however, that if we are not completely confident that it will be done by June 30, then someone should be working on a backstop as we will not be able to extend Merrill and I understand that there are accounting ramifications if ENE repurchases.

Ben

***

[E-mail header graphic]
5/11/2000 2:59 p.m.
From: James A. Hughes
To: Ben F. Glisan
Subject: Re: Nigeria Barge Transaction

We have always understood that is required. However, the first step in any resolution is to fix the deal underlying all of the value. If it is non-performing, then no one will take the Merrill position and we will inherit it. What Sean is indicating is that we are close to not only fixing the deal, but improving it to such an extent that dealing with the Merrill piece will be feasible.

Jim

***

[E-mail header graphic]
5/11/2000 2:35 p.m.
From: Ben F. Glisan
To: Sean Long
Cc: Dan Boyle, James A. Hughes, Barry Schnapper,
Keith Sparks
Subject: Re: Nigeria Barge Transaction

To be clear, ENE is obligated to get Merrill out of the deal on or before June 30. We have no ability to roll the structure.

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[E-mail header graphic]
5/10/2000 9:55 a.m.
From: Sean Long
To: Dan Boyle
Cc: James A. Hughes, Ben F. Glisan, Barry Schnapper,
Keith Sparks
Subject: Re: Nigeria Barge Transaction

Dan:

We have made considerable progress with the Nigerians. We have been working around the clock with the Nigerians to conclude the deal. It looks like we will have agreed to an amendment to the PPA by the end of next week. Citibank is prepared to put up a $60 million L/C once they have concluded their negotiations with NEPA. All the buzz around Nigeria is that the deal is done. I would expect that the L/C would be put in place by the end of next week.

I believe that we will be able to make the June 30 deadline.

Best regards

Sean

***

To: Sean Long

Cc: James A. Hughes, Ben F. Glisan, Barry Schnapper

Subject: Nigeria Barge Transaction

Sean:

What is the status of the arbitration discussions with the Nigeria government?

As we have discussed, should a strategic buyer not materialize by June 30, 2000, APACHI will have to take out ML and the investment in the barges will be placed on balance sheet. This will not only have income implications but require a level of damage control with AA. As you know, ML's decision to purchase the equity was based solely on personal assurances by Enron senior management to ML's Vice Chairman that the transaction price would not go beyond June 30, 2000.

Regards

Dan

GRAND JURY EXHIBIT 18

BENEFITS TO ENRON SUMMARY

Deal Name: **Bargeco** Dollar Amount: **$7.5 million**

Date: **6/29/00**

Description of Transaction: **Enron sold barges to Merrill Lynch (ML) in December of 1999, promising that Merrill would be taken out by sale to another investor by June, 2000. The project could not be sold by June, so without LJM2's purchase Enron would have had to strain the ML/Enron relationship or repurchase the assets and reverse earnings and funds flow on the original transaction.**

Enron Business Unit Benefited: **Enron International (Africa)**

Did the deal result in a direct or indirect benefit to Enron? **Indirect**

Primary Benefit: **Avoidance of earnings and funds flow reversal (indirect)**

Funds Flow Direct: Funds Flow Indirect: **$28.0 million**

Earnings Direct: **$2.0** Earnings Indirect: **$12.0 million**

Fees saved:

Other equity investors bidding on the transaction: **none**

Did the deal close with LJM? **yes**

Other benefits to Enron:

- **Protected the Enron/ML relationship**
- **Speed of execution – under three weeks**
- **Complexity – Nigerian secured transaction**
- **Willingness of execution – Project was located in Nigeria, project was behind schedule and little time was available for due diligence**

Compiled by: **Ace Roman**

18 U.S.C. § 1503

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is–

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C.A. § 1623

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if–

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.